Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1998

OPERATION RESCUE NATIONAL, PHILIP F. LAWLER, RANDALL TERRY DBA OPERATION RESCUE AND ROBERT D. JEWITT DBA OPERATION RESCUE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeal for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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148 pp

QUESTIONS PRESENTED

A United States Senator seeking re-election stated, during a campaign fund-raising luncheon, that Petitioners carried out a national policy of murder and firebombing. The Senator's remark was republished by the news media. Petitioners filed an action for defamation in state court. That suit was removed to federal court pursuant to Title 28 U.S.C. § 2679(d)(2), with the United States substituted for the United States Senator. Because the Federal Tort Claims Act immunizes the United States from suit for defamation, Petitioners' suit was dismissed. In the view of Petitioners, these questions are presented:

1. Did Section 3 of the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563, 4564 (1988), which amended the definition of "Federal agency" in Title 28 U.S.C. § 2671 by adding to its categories "the judicial and legislative branches," expand federal tort claim immunity to include Members of Congress?

2. Under the Federal Tort Claims Act, as amended by the Westfall Act, is a Member of Congress immune from a common law defamation lawsuit when the Attorney General certifies, without express statutory authorization respecting Members of Congress, that the Member was acting as an officer and employee of the United States?

3. If the Westfall Act did expand the scope of Federal Tort Claims Act immunity to cover Members of Congress for the tort of defamation, does Congress possess constitutional authority to grant its Members immunity beyond that conferred on them by the Speech or Debate Clause?

RULE 29.6 STATEMENT

None of the Petitioners is a corporation.

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OPERATION RESCUE NATIONAL, PHILIP F. LAWLER,
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ROBERT D. JEWITT DBA OPERATION RESCUE,

Petitioners,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

DECISIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is reported as *Operation Rescue National v. United States*, 147 F.3d 68 (1st Cir. 1998) (App. 1a). The decision of the United States District Court for the District of Massachusetts is reported as *Operation Rescue National v. United States*, 975 F. Supp. 92 (D. Mass. 1997). (App. 8a).

JURISDICTIONAL STATEMENT

The United States Court of Appeals entered its decision on July 1, 1998. This Court's jurisdiction arises under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions, statutes and public laws, which are involved in the case, are set out in the Appendix to the Petition:

U.S. Constitution Art. 1, Section 1; U.S. Constitution Art. 1, Section 6, Clauses 1 and 2; U.S. Constitution Art. 1, Section 8, Clause 18; and U.S. Constitution Art. 2, Section 2, Clause 2; Title 1 U.S.C. § 1; Title 2 U.S.C. § 60-1; Title 5 U.S.C. §§ 2104, 2105, 2106, 2107; Title 28 U.S.C. §§ 1346, 1442, 2671, 2679, 2680; and, the Westfall Act, Public Law 100-694, November 18, 1988, 102 Stat. 4563.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Edward M. Kennedy, a United States Senator from the Commonwealth of Massachusetts, was a candidate for re-election to the Senate in November, 1994. During his candidacy, on November 15, 1993, the Senator attended a fund-raising event, including a luncheon, in Boston, Massachusetts. Immediately following the event, Senator Kennedy met with reporters, television news camera crews, members of his staff, his wife, and others for a press conference.

During the press conference, Senator Kennedy answered questions about legislation for which he was a leading advocate in the United States Senate, legislation ultimately enacted as the federal Freedom of Access to Clinic Entrances Act, Title 18

U.S.C. § 248. In the course of commenting on that pending legislation, Senator Kennedy made the following statement:

> People can have a difference on public policy issues, but, when we have a national organization like Operation Rescue that has as a matter of national policy firebombing and even murder, that's unacceptable. This is a very targeted legislative remedy to deal with that kind of situation which exists in Massachusetts and in many other parts of the country.

As noted, the remark was made in the presence of several people, including representatives of the media. Subsequently, the remarks were republished by the news media.

Petitioners here, Operation Rescue National, Philip F. Lawler, and Randall Terry and Robert D. Jewitt (both of whom have done business as Operation Rescue), have never advocated firebombing or murder as part of their opposition to abortion. Nor have Petitioners ever engaged in firebombing or murder as part of their opposition to abortion. Thus, the Senator's remarks falsely accused Petitioners of criminal conduct to their hurt and their injury.

STATEMENT OF BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Petitioners resisted federal removal jurisdiction over the litigation, *Operation Rescue National, et al. v. Edward M. Kennedy*, Docket No. 94-02439 (Superior Court, Norfolk Division, Massachusetts), that they filed in state court. App. 13a. Nonetheless, the United States District Court for the

District of Massachusetts exercised jurisdiction over this matter following the assertion by the Attorney General of the United States of statutory removal authority under Title 28 U.S.C. §§ 1442(a)(1) and 2679(d)(2). App. 9a.

Putatively, authority for statutory removal by the Attorney General of the United States was posited on the filing, together with a Notice of Removal, of a Certificate of Scope of Employment in compliance with the Federal Tort Claims Act ("FTCA"). App. 9a. That Certificate stated:

> Pursuant to the authority vested in me by 28 U.S.C. § 2679(d) and 28 C.F.R. § 15.3, I hereby certify that Edward M. Kennedy, United States Senator for the Commonwealth of Massachusetts, was acting within the scope of his employment as an officer and employee of the United States at the time of the conduct alleged in the complaint in this action.

Along with the Notice of Removal, the United States was substituted as the Defendant in place of Senator Edward M. Kennedy. App. 2a.

Petitioners timely opposed removal as provided by Title 28 U.S.C. § 1447(c). App. 9a. The United States moved to dismiss the suit on two grounds. *Id.* The United States argued that it had not waived sovereign immunity in cases of tort claims alleging defamation. *Id.* The United States argued that Petitioners failed to comply with the Federal Tort Claims Act provision regarding administrative pre-requisites to the filing of claims. *Id.* In reply, Petitioners moved to remove the United States as defendant and to remand the suit to state court on the basis that the FTCA as amended did not apply to

Members of Congress. App. 9a. The United States opposed Petitioners' motions.

The District Court rendered its decision on August 27, 1997. App. 8a. The District Court overruled Petitioners' motions and granted the United States' motion to dismiss. App. 12a.

The District Court found that Senator Kennedy's remarks at a press conference following a campaign fund-raising event were within the scope of his employment with the United States. App. 35a-42a. In that respect, the District Court reasoned that the remarks regarding Operation Rescue fulfilled his duty to inform his constituents about pending legislation. App. 39a. The District Court had no difficulty reaching this conclusion even though Senator Kennedy made his remarks as part of fund-raising activities in pursuit of his re-election. App. 17a-18a.

Petitioners had argued that the Westfall Act, which amended the Federal Tort Claims Act, does not immunize Members of Congress. App. 9a. The express language of the FTCA's § 2671 does not include the words "Members of Congress." In its construction of the Westfall Act, the District Court concluded, however, that Congress intended to expand the category of persons protected by federal tort immunity to cover Members of Congress such as Senator Kennedy. App. 27a-35a. The District Court specifically decided that a United States Senator was both an officer and an employee of the United States for purposes of the FTCA as amended, *id.*, notwithstanding the absence of the words "Members [of Congress]" from the statute's text and the absence of any other direction, either in the Act itself or in its legislative history, that

this construction was intended.

Petitioners further objected to the existence of Congressional authority under the United States Constitution to extend tort immunity to cover Members. App. 43a. The District Court concluded to the contrary and held that the Westfall Act was an exercise of a non-specific, general federal power to legislate granted to Congress under U.S. CONST. Art. I, § 1 and the Necessary and Proper Clause, U.S. Const. Art. I, § 8, cl. 18. App. 45a.

Petitioners brought a timely appeal to the United States Court of Appeals for the First Circuit. In the words of the First Circuit,

> the district court . . . considered the following issues: (1) Whether, as a result of the Westfall Act, the FTCA is to be read as including the members of Congress; and (2) Whether, if the FTCA does include Congressmen, its application to these facts is constitutional. We review its resolutions in the affirmative *de novo*, as rulings of law.

App. 3a. The First Circuit, as did the District Court, resolved both these questions against Petitioners, ultimately concluding, "[i]n all respects the decision below is affirmed." App. 7a.

The First Circuit explained, "[Petitioners] ha[ve] shown, from the Constitution and widespread federal statutes, uses of the phrase, 'officers, members and employees,' with 'members' meaning members of Congress. From this it would have us conclude that when Congress said 'officers or employees' here, it made a deliberate and meaningful omission." App. 4a. The

First Circuit concluded that Petitioners' argument rested on "fiction." App. 5a.

Petitioners argued alternatively that Congressmen are neither "officers" nor "employees" of the federal government. App. 5a-6a. The First Circuit also rejected this argument, relying on a brief reference to the decision of the District Court in defense of its decision. App. 6a.

The First Circuit found incredible the proposition that Congressmen would "vote to exclude themselves from a universal grant of immunity given to all others; to all employees below them; to all officers, a president, above them?" App. 6a. At this juncture, the First Circuit rejected the district court's reliance on "concededly weak, post-Westfall Act legislative history favoring the inclusion of congressmen." Moreover, the First Circuit took issue with the argument of Petitioners that the omission from the amending act of the term "members" was of significance. App. 6a-7a.

Having, in its view, disposed of Petitioners' principal arguments against an expansive reading of the Westfall Act, the First Circuit turned to the constitutional arguments presented by Petitioners. App. 7a.

The First Circuit "pass[ed] without comment the contention that 'Congress does not have a general power to legislate,'" App. 7a. Instead, the First Circuit focused on Petitioners' argument that Congress lacked constitutional authority to immunize its Members in the manner suggested by the decision of the District Court. App. 7a. Invoking, but not quoting from, the decision of the District Court, the First Circuit summarily rejected Petitioners' constitutional arguments. App. 7a.

REASONS FOR GRANTING THE WRIT

THE QUESTIONS PRESENTED ARE SUBSTANTIAL, IMPORTANT AND COMPELLING

A. THE DECISION BELOW CONSTRUES THE FTCA AS AMENDED UNNECESSARILY, AND DOES SO IN A MANNER INCONSISTENT WITH THE FTCA'S EXPRESS TERMS AND THE CUSTOMARY, HISTORICAL MEANING ATTRIBUTED TO THOSE TERMS

This Court should grant the Petition in the exercise of its supervisory authority because (i) the First Circuit has construed the provisions of the Federal Tort Claims Act ("FTCA") as amended by the Westfall Act in a manner which is inconsistent with the plain text of the statute and Congress' historical practices, and in a manner which unnecessarily triggers constitutional considerations, and because (ii) the First Circuit has decided an important federal question in a way that conflicts with relevant decisions of the Court. Supreme Court Rule 10.

The questions presented are of paramount importance respecting the republican form of the government of the United States. The lower courts concluded that Members of Congress are officers and employees of the United States. Had the lower courts properly acknowledged the form of government, they would have concluded that Members of Congress occupy a constitutionally and legally unique status as the elected representatives of the people, different in kind and degree from officers and employees. *See* U.S. CONST. Art. 1, § 6, Cl. 2 (the

Incompatibility Clause) ("[A]nd no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office").

The Incompatibility Clause embodies the Framers' organization of the United States government. Members of Congress are, as a fundamental principle of the Framers' constitutional order, mutually exclusive of officers of the United States.[1]

In acknowledgment that its Members are wholly separate and distinct from officers of the United States, Congress has, from its very beginning, consistently accepted and deferred to the Incompatibility Clause's principle when engaged in the writing of federal statutes.[2]

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1. A salient illustration of this constitutional principle is found in the contemporary investigation of the President. Members of Congress, possessing all of the federal power of impeachment, exercise oversight review upon *all* civil officers of the United States, including the Office of the President. Members — because they are *not* officers within the constitutional framework — are not subject to impeachment. *In re Blount*, 8 ANN. CONG. 2318-19 (1799). This distinction, between Members of Congress on one hand, and officers of the United States on the other hand, although a fundamental principle of the American constitutional order, was slighted by the lower courts.

2. Below, Petitioners identified pertinent evidence of the historical practices of Congress of contra-distinguishing between its Members and officers of the United States. That evidence is summarized in three separate tables included in the Petition's Appendix. Table A, App. 75a, reproduces several exemplary statutes in which Congress expressly states that the identified statute is

As Petitioners' tables make clear, deference to the Incompatibility Clause's principle distinguishing between Members and officers prevails in the construction of federal statutes unless Congress has given express direction that this principle is being altered for purposes of a particular statute. Members may be considered, deemed, or treated as "officers or employees" respecting a particular statute, but only when Congress has legislated an express *inclusionary* alteration.[3]

Congress has never legislated the positive exclusion or exemption of itself or its Members from the application of any of its laws because, for the vast majority of federal laws,

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applicable to "Members, officers, employees". Table B, App. 89a, excerpts from several exemplary statutes in which Congress expressly authorizes the treatment of its Members as "employees". Table C, App. 94a, provides citation to exemplary statutes, beginning in 1789, in which Congress demonstrates the contra-distinguishing treatment of its Members from the treatment accorded officers of the United States.

3. A further example of this practice is provided by Congress' correction of § 303(a), Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1746-7, codified as Title 5 U.S.C. § 7353. § 7353(c) originally applied only to "An employee". To conform this subsection with § 7353(a), 103 Stat. at 1746, a subsection which expressly applied to Members, officers and employees of the executive, legislative and judicial branches, Congress amended § 7353(c) "by striking 'An employee' and inserting 'A Member of Congress or an officer or employee'". Ethics Reform Act of 1989: Technical Amendments, Pub. L. No. 101-280, § 4(d)(2), 104 Stat. 149, 158 (1990). If Members were as a matter of course "officers or employees", then no necessity ever existed for expressly correcting this statute to include the words "Member of Congress".

Congress or its Members are not, by the precise terms used in those laws, embraced therein.[4] For this reason, Congress, when desirous of bringing itself or its Members within the ambit of a particular statute, has always legislated this result through an express statement of inclusion. App. 75a-112a (Tables A, B,

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4. As the Congressional Research Service explains:

> Congress does not *affirmatively and expressly* exclude itself from coverage by law. Generally speaking, laws apply to persons, natural and artificial legal persons, frequently on the basis of their status as farmers, bankers, corporations, labor unions[, officers and employees] and the like. As Congress does not fall into these and similar categories which comprise the overwhelming body of law spread over fifty titles of the United States Code, it is *impliedly* exempt from coverage.

Congressional Research Service, CONGRESS' EXEMPTION FROM SELECTED MAJOR LEGISLATION: A LEGAL ANALYSIS, C.R.S. Rep. No. 92-294 A (Mar. 19, 1992), at 2. (The Congressional Research Service is an instrumentality of Congress and works "exclusively" for the Congress, its "committees, Members, and their staffs." *Id.* at *ii.*) As this report further explains:

> Typically, however, a law which is not applicable to Congress does not include specific language *exempting* Congress. Rather, the fact that Congress is outside the scope of such a law is usually explicable by the fact that the pertinent definition of covered 'employee' or 'agency' does not include Congress[or its Members].

Id. at 5.

C).[5] Given this historical context, the First Circuit erred in demanding that Petitioners point at express statutory language excluding Members of Congress from the application of the Westfall Act.[6]

Properly understood and applied, the Incompatibility Clause and Congress' life-long deference to it would have seen the courts below impose on the United States the burden of demonstrating that Members of Congress were *expressly included* within the Westfall Act. The courts below should not have imposed on Petitioners the burden of demonstrating the existence of an *express exclusion.*

In enacting the Westfall Act, Congress gave neither direct not indirect instruction that the organizing principle embodied in the Incompatibility Clause was being altered for purposes of the FTCA's § 2671. Indeed, only silence is found in the Act and its legislative history whether Members of Congress might be deemed "officers and employees." In the absence of an

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5. The Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3, provides a further example. Congress will state expressly when Congress and its Members are to be included within the ambit of a particular statute. The Congressional Accountability Act is an express statement of inclusion on a large scale.

6. The First Circuit incorrectly characterized Petitioners' argument on this point. Petitioners never contended that Members were excluded by a "deliberate and meaningful omission," App. 4a, from the Westfall Act. Rather, Petitioners had argued that Members were simply never included therein because the customary, historical meaning attributable to Title 28 U.S.C. § 2671's phrase "officers and employees" had never embraced Members of Congress.

express statement of inclusion, the principle of the Incompatibility Clause will necessarily prevail.

The lower courts found that Members of Congress are enveloped in a broadly-drawn immunity, of a breadth and scope heretofore unknown and without precedent, appurtenant to election to Congress. In necessary consequence, the lower courts' construction of the FTCA as amended makes fundamental changes in the political process. *See, e.g., Sundquist v. Chastain*, 833 F.2d 311, 324-25 (D. C. Cir. 1987).[7]

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7. Two examples illustrate the distorting impact of the First Circuit's decision on the political process.

During an election campaign, an incumbent Member of Congress defames his challenging opponent, linking his (the Member's) defamation with some legislative matter. The challenger is without recourse. But if, on the other hand, the challenger defames the incumbent Member in an identical manner, the Member *will* have a cause of action (setting aside considerations regarding public figure questions), and can force the challenger into redirecting his personal and financial focus elsewhere, away from the election process. This consequence affects adversely the people's ability to choose whom they would. *Powell v. McCormack*, 395 U.S. 486 (1969).

Even outside of election seasons, the immunity found by the lower courts — enjoyed only by sitting Members of Congress — is a license to libel whenever the defamatory utterance is tied to a legislative matter. Not only does this circumstance serve as a means of reducing or eliminating potential election challengers, it also serves to chill *any* citizen-initiated criticism of incumbent Members. Unlike officers, who are checked by higher ranking officers and, ultimately, by the impeachment process, no process, under the First

In the years following the enactment of the Westfall Act, this Court has considered the text and operation of the FTCA on at least seven occasions. *See United States v. Smith*, 499 U.S. 160 (1991); *United States v. Gaubert*, 499 U.S. 315 (1991); *Molzof v. United States*, 502 U.S. 301 (1992); *Smith v. United States*, 507 U.S. 197 (1993); *McNeil v. United States*, 508 U.S. 106 (1993); *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994); *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417 (1995). In four instances, *United States v. Smith*, *Smith v. United States*, *McNeil v. United States*, and *Gutierrez De Martinez v. Lamagno*, this Court granted certiorari to resolve conflicts among the Circuit Courts of Appeal regarding various aspects of the FTCA and its operation.[8] In the remaining three cases, however, important questions of the meaning and operation of the FTCA led this Court not to postpone consideration until the development of conflicts in interpretation and application of the FTCA as

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Circuit's decision, stands as a check on a defaming Member of Congress, indeed, not even the election process. A Member's grasp on political power becomes self-perpetuating, resulting in an unbalanced, distorted system of "representation."

8. *United States v. Smith*, 499 U.S. at 165 ("[w]e granted certiorari . . . to resolve a conflict among the Circuits") (citation omitted); *Smith v. United States*, 507 U.S. at 200 ("[w]e granted certiorari to resolve a conflict between two Courts of Appeals") (footnote and citation omitted); *McNeil v. United States*, 508 U.S. at 110 ("we granted certiorari to resolve the conflict") (footnote and citation omitted); *Gutierrez De Martinez v. Lamagno*, 515 U.S. at 423 ("[t]he Circuits divide sharply on this issue. . . . We granted certiorari to resolve the conflict") (footnote and citation omitted).

amended warranted this Court's harmonizing attention.[9]

The instant petition, involving the tortious, defamatory behavior of a Member of Congress, presents an important and substantial question regarding the FTCA as amended, in the manner of the petitions granted in *United States v. Gaubert*, *Molzof v. United States*, *Federal Deposit Insurance Corporation v. Meyer*. This Court's attention and the exercise of its judicial discretion in settling an important question of federal law is, therefore, warranted, Supreme Court Rule 10, because future instances of defamatory behavior by Members may reasonably be expected.

The FTCA, properly construed and confined to its defined scope, serves important governmental purposes.

First, the FTCA provides the means by which persons may be compensated for injuries resulting from the negligent or wrongful conduct of federal government employees. The Act

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9. *United States v. Gaubert*, 499 U.S. at 319 ("[t]he question before us is whether certain actions taken by the FHLBB and FHLB-D are within the 'discretionary function' exception to the liability of the United States under the FTCA. The Court of Appeals for the Fifth Circuit answered this question in the negative. We have the contrary view and reverse"); *Molzof v. United States*, 502 U.S. at 304 ("[w]e granted certiorari to consider the meaning of the term 'punitive damages' as used in the FTCA") (citation omitted); *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. at 477 ("we conclude that Meyer's constitutional tort claim is not 'cognizable' under § 1346(b) because it is not actionable under § 1346(b)--that is, § 1346(b) does not provide a cause of action for such a claim").

accomplishes this purpose by abrogating the sovereign immunity of the United States in selected circumstances.

Second, the FTCA immunizes federal employees from personal liability in tort for conduct within the scope of employment. In the view of Congress, such immunity serves important and valuable purposes related to effective government. *Cf.* P.L. 100-694 § 2(a).

The decisions below, however, fail to respect the text of the FTCA, the history of that Act and of the amendatory Westfall Act, the customary, historical use of language by Congress in federal legislation, and the limits of Congressional authority to enact legislation.

Nothing in the express terms of the FTCA as amended immunizes Members of Congress from suit for the injuries caused by their conduct. Moreover, it is certain that, prior to the amendments resulting from the Westfall Act, the FTCA neither immunized Members of Congress from liability for their negligent or wrongful conduct nor made the FTCA the exclusive remedy for those persons injured by such acts of Members of Congress.[10]

In *Westfall v. Erwin*, 484 U.S. 292, 293-94 (1988), this Court concluded that FTCA immunity only extended to covered employees for conduct of a discretionary nature. This

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10. Of course, the United States Constitution had always provided a specific, limited, and unique source of immunity to Members for their legislative function, to-wit, the Speech and Debate Clause. U.S. CONST. Art. I, § 6.

Court concluded that limiting the availability of FTCA immunity to circumstances involving the exercise of discretionary judgment served to insure that "the contributions of immunity to effective government" would "in particular contexts outweigh the perhaps recurring harm to individual citizens." 484 U.S. at 295-96. Nonetheless, this Court noted the superior position of the Congress to define the scope of federal tort immunity. 484 U.S. at 300.

Congress reacted promptly to the decision in *Westfall* by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act"), Pub.L. No. 100-694, 102 Stat. 4563 (1988).[11] The Westfall Act amended several provisions of the FTCA to extend immunity to federal employees from liability for tortious conduct occurring within the scope of employment. Until the enactment of the Westfall Act, "the list of government employees covered by the FTCA did not include those of the judicial and legislative branches . . . ." App. 4a. Among its provisions, the Westfall Act amended Title 28 U.S.C. § 2671 by inserting after "executive departments," the phrase "the judicial and legislative branches." As amended, § 2671 reads, in pertinent part:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, *the judicial and legislative branches*, the military departments, independent

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11. The "findings" by Congress in support of the Westfall Act, *see* P.L. 100-694 § 2(a)(4)-(7), confirm the obvious fact that the legislation was adopted in reaction to the *Westfall* decision.

> establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

App. 63a-64a (emphasis added).

When a tort action is brought against a federal employee, the Attorney General may certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." Title 28 U.S.C. § 2679(d)(1). This certification serves to substitute the United States as the sole defendant, *id.*, and, if the suit was filed in state court, to remove the case to federal court, Title 28 U.S.C. § 2679(d)(2). Since the action against the United States is the exclusive remedy, Title 28 U.S.C. § 2679(b)(1), substitution of the United States as the sole defendant serves to immunize the defendant employee from liability. *See, e.g., United States v. Smith*, 499 U.S. 160, 166 (1991) . And, in cases such as the present one, in which the claimed injury is defamation, the United States has specifically reserved sovereign immunity from liability.[12]

The United States Court of Appeals for the First Circuit erroneously concluded that, consequent with the Westfall Act, Senator Kennedy was cloaked with federal tort immunity by reason of his election to the Senate and service as a United States Senator from Massachusetts. The lower court's

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12. The FTCA provides, in pertinent part, that a FTCA remedy shall not be available for "any claim arising out of ... libel [or] slander ..." Title 28 U.S.C. § 2680(h).

conclusion rested on the faulty premise that a Member of Congress is an "officer" or "employee" of the legislative branch for purposes of the FTCA as amended.[13]

Contrary to the First Circuit's erroneous premise, Petitioners demonstrated three key principles supporting their textual argument for finding that Members of Congress were not immunized by the FTCA as amended. First, Petitioners showed that the legislative branch of the federal government includes three categories of personnel: Members, officers, and employees. App. 75a, 94a (Tables A, C). Second, Petitioners showed that, in legislation and in the governance of its own affairs, Congress always has observed a historic and enduring practice of referring to the elected representatives of the people as "Member[s]" and of referring to other legislative personnel as "officers" or "employees." App. 94a (Table C). And, third, Petitioners showed that Congress has only brought its "Members" within the scope of a statutorily-defined provision affecting federal "officers" or "employees" by means of an express statement of inclusion to that end. App. 75a-112a (Tables A, B, C).

The decision below, concluding without more, that Members of Congress are "officers" of the federal government, raises substantial and important issues regarding the nature of elected representatives, their relationship to the created

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13. While this Court may not have addressed specifically the questions presented by this Petition, precedents of this Court suggest that the First Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Supreme Court Rule 10(c). *Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976); *Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986).

government, and their relationship to the people. *Cf.* U.S. CONST. Art. 1, § 6. Petitioners had argued to the courts below that Article I, § 6 defined important aspects of the relationship of Members of Congress with the people whom they represent, including, as an integral part of that relationship, the extent of immunity which the people had volitionally surrendered. To this extent, the quantum of surrendered immunity was co-extensive with Members' constitutionally designated function, namely, the enactment of statutes through the legislative process. Petitioners argued that Members did not possess any constitutional authority permitting them to lessen their accountability *to* the people through enlargement of their immunity *from* the people.

This Court has previously construed other aspects touching upon the relationship between Members of Congress and the people in strict compliance with the text of Article I. *See Powell v. McCormack*, 395 U.S. 486 (1969) (Art. I, §§ 2, 5; neither house of Congress is empowered to impose additional qualifying burdens on an otherwise qualified Member), *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Art. I, §§ 2, 3, 4; qualification for service in Congress cannot be enlarged by Congress or the States). Or with the text of Article II. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (Art. II, § 2, cl. 2). *Cf. also Clinton v. City of New York*, 118 S. Ct. 2091 (1998) (Art. I, § 7; "There are powerful reasons for construing constitutional silence on this profoundly important issue [viz., the process by which statutes are enacted] as equivalent to an express prohibition." *Id.* at 2103). The Court's decision in *Clinton* strongly suggests that any matter which touches directly and integrally the process by which statutes are enacted, among which are speech and debate and the immunity attendant thereto, may not be enlarged or diminished. The structure of the

Constitution and the cited decisions of the Court thus support the argument that Congress is without authority to enlarge the privileges and immunities accorded to its Members under Article I, § 6. This Court should grant the Petition to answer these important federal issues.

The arguments proffered and rejected (or ignored) by the courts below model judicial and constitutional economy. Petitioners' suggested reading — that the FTCA's phrase "officers or employees" of the "legislative branch[]" describes two other, readily-identified (*see* chapter 4, Title 2 U.S.C. §§ 60-1 *et seq.*), categories of legislative personnel neither of which includes Members of Congress — gives to the FTCA as amended a sensible, plausible and non-expansive reading consistent with historic and regular legislative practice. Further, Petitioners' reading of the FTCA as amended would have allowed the lower courts to avoid the unnecessary consideration of constitutional issues. *Spector Motor Company v. McLaughlin*, 323 U.S. 101, 105 (1944).

Moreover, the reading of the FTCA suggested by Petitioners would have obviated all issues of redundancy. The First Circuit's transformation of the phrase "officers or employees" (as found in Title 28 U.S.C. § 2671), into the statutory equivalent of the phrase "Members, officers or employees" renders numerous federal statutes redundant. *Cf. West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 88-92 (1991). App. 75a, 94a (Tables A, C). Under the First Circuit's ruling, interpreting federal statutes becomes a game of speculation. When encountering the statutory phrase "officers and employees," citizens guess at their peril whether the statute means "officers and employees" or "*Members*, officers and employees."

If the courts below had confined themselves to the actual words of Title 28 U.S.C. § 2671 and had not read that statute expansively, the problems of speculation, redundancy and constitutionality would never have arisen. The First Circuit's decision requires that historic statutory practices, accepted meanings, and plausibility be thrown to the wind. Thus, this Court should, as it did in *United States v. Gaubert*, *Molzof v. United States*, and, *Federal Deposit Insurance Corporation v. Meyer*, grant the Petition to consider the statutory construction issues raised by the first and second questions presented.

B. THE DECISION BELOW ASSERTS THAT CONGRESS MAY EXERCISE A GENERAL FEDERAL POWER TO LEGISLATE UNCONNECTED TO ANY SPECIFIC GRANT OF LEGISLATIVE AUTHORITY

Had the United States Court of Appeals for the First Circuit construed the "officers or employees" of the "legislative branch[]" language found in Title 28 U.S.C. § 2671 according to its plain text, rather than expansively converting that language into "*Members*, officers or employees," the constitutional issues raised by the questions presented here would have been avoided altogether.

From the earliest days of the Republic, this Court has been called on to consider the scope of, and limitations on, the power of the Congress to enact legislation. Most recently, in at least four cases, this Court has granted review on certiorari in the absence of any conflict among the circuits to address questions directed to the scope of Congressional legislative authority. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997); *Printz v. United States*, 117 S. Ct. 2365 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S.

211 (1995).[14] Because it has been construed by the lower court to shield Members of Congress from common law tort liability, the Westfall Act exceeded the legislative prerogative of the Congress. Precisely put, the First Circuit simply failed to identify the valid, constitutional source of authority for enactment of the Westfall Act, as that Act applies to Members of Congress.

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14. *See City of Boerne v. Flores*, 117 S. Ct. at 2160 ("[t]he District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment. The court certified its order for interlocutory appeal and the Fifth Circuit reversed, finding RFRA to be constitutional. . . . We granted certiorari . . . and now reverse") (citations omitted); *Printz v. United States*, 117 S. Ct. at 2369 ("the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional, but concluded that that provision was severable from the remainder of the Act, effectively leaving a voluntary background-check system in place. . . . A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding none of the Brady Act's interim provisions to be unconstitutional. . . . We granted certiorari") (citations omitted); *United States v. Lopez*, 514 U.S. at 551 ("[t]he Court of Appeals for the Fifth Circuit . . . held that, in light of what it characterized as insufficient congressional findings and legislative history, 'section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause.' . . . Because of the importance of the issue, we granted certiorari . . . and we now affirm") (citations omitted); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. at 213 ("[t]he question presented in this case is whether § 27A(b) of the Securities Exchange Act of 1934, to the extent that it requires federal courts to reopen final judgments in private civil actions under § 10(b) of the Act, contravenes the Constitution's separation of powers or the Due Process Clause of the Fifth Amendment").

The United States asserted below that Congress' power to expand the scope of the FTCA to cover Members of Congress is found in the constitutional provision vesting the legislative power of the federal government in the Congress, U.S. CONST., Art. 1, § 1, and in the Necessary and Proper Clause, U.S. CONST., Art. 1, § 8, cl. 18.[15]

Petitioners do not contend that the Necessary and Proper Clause is an invalid source of authority for legislation. To be clear, Petitioners contended below that the Necessary and Proper Clause is a secondary, or a derivative, source of authority. As this Court has demonstrated repeatedly, the Necessary and Proper Clause enhances authority granted to Congress by other constitutional provisions.[16] Therefore, the invocation of the Necessary and Proper Clause must be preceded by the invocation of a primary, textual source of

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15. This latter clause has been described by this Court as "the last, best hope of those who defend ultra vires congressional action . . . ." *Printz v. United States*, 117 S. Ct. at 2378-79 (SCALIA, J., joined by REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ.).

16. For example, in *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976), this Court found that Congress possessed power to regulate the presidential election process by enacting public financing of elections under its power to legislate for the "general welfare," legitimately enhanced by the grant of authority to Congress under the Necessary and Proper Clause. And, in *Hannah v. Plumer*, 380 U.S. 460, 471 (1965), this Court explained that Congress had authority to make rules of procedure for the federal courts as a consequence of its constitutional power to create inferior federal courts, again enhanced by the grant of authority under the "Necessary and Proper Clause."

constitutional authority. The lower courts failed to identify any such source. Article I, § 1 is not a primary source. By its own terms — "herein granted" — the constitutional reader is directed elsewhere in locating the primary sources of constitutional authority.

The decisions below and the arguments supporting them by the United States represent an instance of constitutional cobbling but not one that has been countenanced by any previous decision of this Court. Such a construct for Congressional authority cannot withstand the standard of review to which this Court has subjected a variety of other legislative enactments, including recently the Religious Freedom Restoration Act, the Brady Handgun Violence Protection Act, and the Gun-Free School Zones Act.

This Court should, as it did in *City of Boerne*, *Printz*, *Lopez*, and *Spendthrift Farm, Inc.*, grant the Petition in order to consider the putative source of Congressional authority for enacting legislation granting immunity to Members of Congress for common law torts not otherwise encompassed within the immunity accorded to Members by the Speech or Debate Clause, raised by the third question presented.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted and the case set for plenary review.

Respectfully submitted,

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Dated: September 28, 1998.

APPENDICES

[Appendix A]

United States Court of Appeals, First Circuit.

No. 97-2290

OPERATION RESCUE NATIONAL, et al., Plaintiffs, Appellants,

v.

UNITED STATES of America, Defendant, Appellee.

Before BOUDIN, *Circuit Judge*, ALDRICH and CYR, *Senior Circuit Judges*.

Paul F. Galvin with whom *Randal C. Fritz* was on brief of appellants.

John F. Daly with whom *Mark B. Stern*, Attorneys, Appellate Staff, *Stephen W. Preston*, Deputy Assistant Attorney General, *Donald K. Stern*, United States Attorney, and *Frank W. Hunger*, Assistant Attorney General, were on brief for appellee.

July 1, 1998

ALDRICH, *Senior Circuit Judge*. On November 15, 1993 Senator Edward M. Kennedy, in Boston, following a campaign fund-raising luncheon, addressed a group of reporters in connection with a bill protecting access to clinics serving women's health, including abortions. The bill, of which he was the prime sponsor, was to be debated in the Senate the following day. In the course of his remarks, in answer to a question regarding this legislation, the Senator stated that organizations like Operation Rescue National ("Operation Rescue") had a "national policy [of] firebombing and even murder." Operation Rescue brought suit for defamation against the Senator in the Massachusetts Superior Court. Pursuant to 28 U.S.C. § 2679(d) of the Federal Tort Claims Act ("FTCA"), the United States Attorney filed therein a certification to the effect that Senator Kennedy "was acting within the scope of his employment as an officer and employee of the United States at

the time of the conduct alleged in the complaint," and moved to remove the action to the United States District Court. The removal was effected and the district court thereupon granted the United States' motion for its substitution for Senator Kennedy as a defendant immunized by the FTCA. Because the FTCA excepts liability for defamation, see id. § 2680(h), the court thereafter granted summary judgment for the United States, leaving Operation Rescue with no claim against either it or the Senator. See id. § 2679(b)(1) (providing that an action against the United States is the exclusive remedy); United States v. Smith, 499 U.S. 160, 166-67, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991) (holding that the exclusivity of remedy provision applies even if government liability is precluded).

We affirm those actions, but, before proceeding further, we review the Westfall Act, so-called, the first step in producing this result, starting with the history leading to its enactment.

One Erwin suffered injuries allegedly as a result of the negligence of Westfall and others, employees of the United States executive branch, in performing official acts--the storage of dangerous chemicals. See Westfall v. Erwin, 484 U.S. 292, 293-94, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988). He brought suit against the individual defendants in the state court, but this action was removed to the district court pursuant to 28 U.S.C. § 1442(a)(1). This court held, by summary judgment, that defendants were absolutely immune because their conduct had been in the course of their government employment. The Court of Appeals reversed, holding that government employees were immune only for conduct of a discretionary character. It ordered the case remanded for a determination whether defendants' conduct was of that nature. On defendants' obtaining certiorari, the Court agreed with the Court of Appeals. Inter alia, it stated, "[O]fficial immunity comes at a great cost.... [A]bsolute immunity for federal officials is

justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.'" Id. at 295- 96, 108 S.Ct. 580 (citation omitted). Without laying down standards, the Court affirmed. In so doing, it remarked that Congress was in the best position to rule on what was required for immunity. See id. at 300, 108 S.Ct. 580.

This Congress promptly did by the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. No. 100-694, 102 Stat. 4563, the so- called Westfall Act. Beside removing the Westfall v. Erwin discretionary requirement, it increased the scope of the FTCA by adding employees of the judicial and legislative branches to those of the executive branch.

In a comprehensive Memorandum, Operation Rescue National v. United States, 975 F.Supp. 92 (D.Mass.1997), the district court, in addition to disposing of other matters no longer involved,[1] considered the following issues: (1) Whether, as a result of the Westfall Act, the FTCA is to be read as including the members of Congress; and (2) Whether, if the FTCA does include Congressmen, its application to these facts is constitutional. We review its resolutions in the affirmative de novo, as rulings of law. See, e.g., Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 653, 655 (1st Cir.1997). Beginning with the first, we agree with the district court's result, but approach it differently.

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1. E.g., plaintiff did not appeal from the finding that the Senator was acting within the scope of his employment when he made his remarks.

Congressmen[2] as Officers or Employees?

At the time of Westfall v. Erwin, the list of government employees covered by the FTCA did not include those of the judicial and legislative branches:

Definitions[3]

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments.... "Employee of the government" includes officers or employees of any federal agency, members of the military....

The Westfall Act added the words "the judicial and legislative branches" to follow "the executive departments" in the first paragraph. It made no change in the second.

In almost unlimited number, Operation Rescue has shown, from the Constitution and widespread federal statutes, uses of the phrase, "officers, members and employees," with "members" meaning members of Congress. From this it would have us conclude that when Congress said "officers or employees" here, it made a deliberate and meaningful omission. We quote its brief, pp. 7 and 14,

> Section 3 of the Westfall Act makes the FTCA applicable to "officers or employees" of the "legislative branch[ ]". A United States Senator is neither. Congress' historical practice, since its (sic) 1789, has been to reference the three classes of persons found in the halls of Congress as either "Member", "officer", or "employee". Congress chose defining, restrictive

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2. We use this word throughout to include members of both Houses, as well as both sexes.

3. 28 U.S.C. § 2671.

> language, "officers or employees" of the "legislative branch [ ]", when it wrote its 1988 Westfall Act. So choosing, Congress identified a readily identified body of congressional personnel which does not include United States Senators.
>
> . . . .
>
> Of course the Members of the 100th Congress knew to whom they were referring when they wrote into the Westfall Act the restrictive language, "officers or employees" of the "legislative branch[ ]".
>
> In writing statutes, Congress chooses its words carefully....

(Emphases added).

Aside from the final sentence, the rest is fiction. A voting Congressman who went beyond reading "FEDERAL EMPLOYEES LIABILITY" in the Westfall Act title would not find the claimed-to-be restrictive language even once. The Act's expressly declared purpose was to "protect Federal employees from personal liability for common law torts"; the phrase "Federal employee" occurred ten times, and the word "officer" and the phrase "officers and employees" never. See Westfall Act § 2, 102 Stat. 4563-64. How many astute legal minds who bothered to go further and read the FTCA, and saw there the phrase "officers or employees", would have thought of Operation Rescue's omission argument?[4] We cannot think the Westfall Congress should be charged with plaintiff's connotation.

Alternatively, Operation Rescue would say that, as a matter

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4. We note, in passing, that when written, this phrase did not "omit" members because the legislative branch was not then in the Act.

of law, Congressmen are neither "officers" nor "employees" of the federal government. The district court has compiled much detail rejecting this assertion that we need not repeat. See, e.g., Lamar v. United States, 241 U.S. 103, 36 S.Ct. 535, 60 L.Ed. 912 (1916). Operation Rescue, incomprehensibly, persists.[5]

We add that even were this correct, circumstances speak louder than words. We ask a simple question--Why would Congressmen vote to exclude themselves from a universal grant of immunity given to all others; to all employees below them; to all officers, up to the president, above them? The district court noted some, concededly weak, post-Westfall Act legislative history favoring inclusion of Congressmen. We think it more important to look to contemporary legislative history. Here we find nothing relevant. Like the famous dog that remained silent,[6] the silence is telling. If the Westfall Act clearly and carefully intended to exclude Congressmen from the FTCA's otherwise universal benefits, would there not have been, at the least, some Congressmen who would have remonstrated?

There is no such legislative history, or Operation Rescue's counsel would have found it. If, which we consider it does not, the strict language should be read as Operation Rescue would have it, this would be a clear case where contrary circumstances

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5. It would even disregard common meanings given in all dictionaries. See e.g., Webster's New Int'l Dictionary 1690-91 (2d ed.1954) (defining "office" as "any position or place in the employment of government, esp. one of trust or authority" and "officer" as "one who holds an office"); cf. Black's Law Dictionary 900 (6th ed.1990) (defining "legislative officer" as including "members of Congress").

6. The Adventure of Silver Blaze, A. Conan Doyle.

as a whole would surely prevail. Cf. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571-74, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982).

Failing here, Operation Rescue would supplement with constitutional claims. These have been well answered by the district court. We pass without comment the contention that "Congress does not have a general power to legislate," except to note M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406, 413, 4 L.Ed. 579 (1819), and turn to Operation Rescue's main theme, that this is an immunity from which Congressmen are uniquely exempt. Accordingly, Congress could grant immunity from defamation claims to other federal officers or employees, but it could not vote such benefits for itself. Further, the Speech or Debate Clause is a ceiling rather than a floor. For this last, the basic contention is, by its having given Congressmen some protection not given to others, the Constitution implicitly forbad any increase by statute, even when giving greater protection to others. This is singular logic. We need not repeat the district court's extensive rejections, with which we agree.

In all respects the decision below is affirmed.

[APPENDIX B]

In The

United States District Court for Massachusetts.

OPERATION RESCUE NATIONAL, Philip F. Lawler, Randall Terry d/b/a Operation Rescue, and Robert D. Jewitt d/b/a Operation Rescue, Plaintiffs,

v.

UNITED STATES of America, Defendant.

C.A. No. 94-12504-MLW.

Aug. 27, 1997.

Paul F. Galvin, Office of Paul F. Galvin, Randall Fritz, Manchester, MA, for Plaintiffs.

Roberta T. Brown, U.S. Atty's Office, Boston, MA, for Defendant.

MEMORANDUM AND ORDER

WOLF, District Judge.

I. SUMMARY

This action arises out of statements made by Senator Edward M. Kennedy on November 15, 1993, in Boston, Massachusetts. After participating in an event to raise funds for his upcoming campaign for reelection, Senator Kennedy was questioned by the media about, among other things, the "Freedom of Access to Clinics Act" (the "FACE Act" or the "Bill"), which was to be considered by the United States Senate the next day. The Bill proposed to establish federal criminal penalties and civil remedies for interfering with access to facilities providing reproductive health care, including abortions. Senator Kennedy was leading the ultimately successful effort in the Senate to have the Bill enacted. In response to a question from the media, Senator Kennedy said, in part, that the proposed legislation was needed because "we have a national organization like Operation Rescue that has as a matter of national policy firebombing and even murder ..."

Operation Rescue, an unincorporated association of individuals dedicated to opposing abortion, and some of its members, brought this action against Senator Kennedy in the Norfolk Superior Court of the Commonwealth of Massachusetts. They allege that they were each defamed by Senator Kennedy's remarks and seek damages for injury to their respective reputations.

Pursuant to provisions of the Federal Tort Claims Act (the "FTCA"), which were added in 1988 by what is known as the "Westfall Act," the United States Attorney for Massachusetts certified that Senator Kennedy was acting within the scope of his employment when he made the remarks now at issue. Accordingly, the United States Attorney removed this case to federal court, where the United States was substituted for Senator Kennedy as the defendant, as contemplated by the FTCA. Because the FTCA does not provide a remedy against the United States for libel or slander, the defendant has moved that this action now be dismissed.

Plaintiffs oppose the motion to dismiss. In addition, they have filed motions to remand to state court and to reinstate Senator Kennedy as the defendant. Plaintiffs argue that there were defects in the United States Attorney's certification process; that the substitution of the United States as the defendant was improper because the Westfall Act provisions of the FTCA do not apply to United States Senators and, in any event, because Senator Kennedy was not acting within the scope of his employment when he made his remarks regarding Operation Rescue; and that the application of the FTCA to immunize Senator Kennedy from liability for defamation would violate several provisions of the United States Constitution, particularly the Speech or Debate Clause, Art. I, § 6.

The court has held two hearings and carefully considered

the parties' contentions, including the merits of plaintiffs' claim that if the Westfall Act protects members of Congress it is unconstitutional as applied--an issue that evidently has not been addressed previously by any court. For the reasons described in detail in this Memorandum, the court concludes as follows.

Operation Rescue has standing to maintain this case, although the individual plaintiffs may not. See § IV.A. Any alleged defects in the process utilized by the United States Attorney in deciding to certify that Senator Kennedy made his remarks concerning Operation Rescue while acting within the scope of his employment are not relevant. The remedy for any such error is the de novo review of the scope of employment issue by this court that plaintiffs have received. See § IV.D.

Senators are protected by the Westfall Act for alleged wrongs committed within the scope of their employment. See § IV.E. As described earlier, Senator Kennedy made the remarks about Operation Rescue alleged to be defamatory in response to a question from the media regarding proposed legislation he was leading the effort to enact. His remarks about Operation Rescue were made, at least in part, to inform the public of the reasons for his position on a legislative matter. Making such statements is one of a Senator's official duties. In acting on a motion to dismiss the court must view the record in the light most favorable to plaintiffs and give them the benefit of all reasonable inferences in their favor. Therefore, the court assumes for present purposes that the Senator's remarks were also motivated in some measure by a desire to promote his personal popularity, and thus enhance his ability to raise campaign funds and win votes. In our electoral system, however, such public and personal motives are essentially inseparable because it is natural for public officials to believe that their own success, and that of their political parties, are inextricably linked to the public interest. It is not necessary or

appropriate for the court to attempt to determine the predominant motive for Senator Kennedy's remarks about Operation Rescue. Under Massachusetts law, which governs on this issue, Senator Kennedy's conduct may be deemed to be outside the scope of his employment only if he acted from purely personal motives that were in no way connected to his official duties. This is not such a case. See § IV.F.

Accordingly, the Westfall Act provides Senator Kennedy immunity for his remarks regarding Operation Rescue unless that statute is unconstitutional as applied to a United States Senator. Plaintiffs assert primarily that the Speech or Debate Clause of the Constitution, which provides immunity for a Senator's conduct while in Congress, prohibits a legislative expansion of that protection. That contention, however, is incorrect. The Westfall Act is not unconstitutional by virtue of the Speech of Debate Clause or for any other reason. See § IV.G.

The Constitution vests in Congress the power to legislate and the authority to enact laws it deems "necessary and proper" to facilitate the exercise of that power. Since Chief Justice John Marshall's seminal decision in M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819), the Necessary and Proper Clause of the Constitution has been interpreted expansively. Courts traditionally uphold legislation that reasonably relates to one of the federal powers established by the Constitution, unless that legislation violates the Bill of Rights or some other specific restriction expressly included, or clearly implied, in the Constitution.

It was reasonable for Congress to conclude that more extensive immunity for Senators and Representatives than the protection provided by the Speech or Debate Clause is now needed to facilitate its power to legislate. Prior to the Westfall Act, members of Congress were required to defend suits for

statements criticizing what they viewed as wasteful public spending, among others. As the Supreme Court recently reiterated in Clinton v. Jones, --- U.S. ----, ----, 117 S.Ct. 1636, 1643, 137 L.Ed.2d 945 (1997), in cases involving prosecutors, legislators, and judges, the Court has repeatedly held that providing immunity to such officials for actions relating to their governmental responsibilities serves the public interest by encouraging them to perform in a principled fashion, uninhibited by the fear that some candid statement or other action will generate expensive litigation and, perhaps, personal liability. The Westfall Act also serves this purpose and is, therefore, reasonable.

Congress' power to expand the immunity provided by the Constitution for its members is not restricted by the Speech or Debate Clause. That provision does not expressly limit the power vested in Congress by the Necessary and Proper Clause to decide the most appropriate scope of legislative immunity today. Nor is such a prohibition implicitly manifest in the Speech or Debate Clause, which, for example, is not located in the prohibitions on legislative authority enumerated in Article I, § 9. Accordingly, because the Constitution does not place any special restriction on Congress' power to expand the immunity of its members, and because it was reasonable for Congress to exercise that authority by enacting the Westfall Act, plaintiffs have failed to prove that statute is unconstitutional as applied in this case.

Therefore, plaintiffs' motions to remand are being denied and defendant's motion to dismiss is being allowed. While this means that plaintiffs have no legal remedy for the wrong they allege that they have suffered, it does not mean that there is no means of holding Senator Kennedy and his colleagues in Congress accountable for defamatory remarks that they may make.

This case has required the court to reflect upon the current implications of first principles. In deciding it, the court is reminded that primary among these is the fundamental fact that our government derives its power from the people. This means, among other things, that Senators and Representatives must command the confidence of their constituents if they wish to retain their offices. Knowledge of this generally restrains the actions of members of Congress, even in an absence of the threat of a successful law suit for their actions. If plaintiffs wish to persist in their effort to redress the harm that they believe Senator Kennedy wrongly inflicted on them, they may appeal to the ultimate source of accountability in our democracy--they may appeal to the fairness of a free people and compete with Senator Kennedy for their verdict.[7]

II. PROCEDURAL BACKGROUND

Plaintiff's complaint was filed against Senator Kennedy in the Superior Court of the Commonwealth of Massachusetts for Norfolk County on November 15, 1994. After certification by United States Attorney Donald Stern that Senator Kennedy was acting within the scope of his federal employment at the time his statements about Operation Rescue were made, the United States removed the case to federal court pursuant to 28 U.S.C. §§ 2679(d)(2) and 1442(a)(1). On December 23, 1994, Judge Reginald Lindsay ordered the United States substituted as the sole defendant pursuant to 28 U.S.C. § 2679(d)(1). Following the recusals of Judges Lindsay and Richard Stearns, the case was assigned to this court.

On January 25, 1995, plaintiffs filed a motion to remand for procedural defects, alleging that the notice of removal and

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7. Plaintiffs may also, of course, appeal this court's decisions to the Court of Appeals for the First Circuit.

scope of employment certification of the United States Attorney are defective because they fail to provide sufficient facts to support a conclusion that Senator Kennedy was acting within the scope of his employment as a federal officer at the time he made the statements at issue.

On March 8, 1995, the United States filed a motion to dismiss plaintiffs' complaint on the grounds that the United States has not waived its sovereign immunity for claims for defamation, and that plaintiffs have failed to comply with the jurisdictional prerequisites for an FTCA suit as set forth in 28 U.S.C. §§ 2401 and 2675.

On July 14, 1995, plaintiffs filed a motion to vacate the scope of employment certification and a further motion to remand, both supported by memoranda addressing, principally, constitutional objections to the application of the Westfall Act to members of Congress.

Thus, at that time it appeared that the plaintiffs were alleging certain procedural defects in the certification process, but seeking to prevail primarily on the contention that the pertinent provisions of the FTCA were unconstitutional as applied to members of Congress, and reserving for possible later assertion foreseeable statutory claims that even if the FTCA protected Senators from suit for defamation in some circumstances, Senator Kennedy was not entitled to such immunity in this case because he was not acting within the scope of his employment when he made the statements now at issue. In a June 29, 1996 Memorandum and Order the court noted that plaintiffs' initial motion to remand for alleged procedural defects did not appear to be meritorious and wrote:

> Plaintiffs have suggested in their papers that they may also seek to challenge the Attorney General's scope of employment certification on non- constitutional grounds; i.e., on the grounds that Senator Kennedy was not acting

within the scope of his employment when the statements in dispute were made. If plaintiffs do, in fact, wish to assert such a claim, it is appropriate to decide this scope of employment question prior to resolving any constitutional questions. "[I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [a federal court] ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." Spector Motor Service v. McLaughlin, 323 U.S. 101, 105, [65 S.Ct. 152, 154, 89 L.Ed. 101] (1944). At this point in the proceedings, the constitutional questions may be avoidable. If Senator Kennedy was not acting within the scope of his employment at the relevant time, then remand would apparently be proper and the constitutional challenges made by the plaintiffs would not need to be decided by the court. The Court of Appeals for the First Circuit has held that a district court has the duty to determine the scope of employment question when a plaintiff places the issue in dispute. Nasuti v. Scannell, 906 F.2d 802, 808 (1st Cir.1990).

Therefore, the court ordered that if the plaintiffs wished to seek a remand on statutory, rather than constitutional, grounds, they file and brief a motion on those grounds, which the court would consider before confronting the constitutional questions they had raised.

A hearing was held on November 19, 1996, at which the parties addressed the alleged procedural defects in the certification process, the issue of the applicability of the Westfall Act provisions of the FTCA to United States Senators, and the question whether the remarks at issue were made by Senator Kennedy within the scope of his employment. At the conclusion of the hearing, it appeared to the court that the question of remand could not be resolved on statutory grounds

alone and that it would be necessary to decide the constitutional issues presented. Thus, the parties were ordered to supplement their submissions concerning those issues. In addition, defendant was ordered to provide plaintiffs with any videotapes it had of the fundraising event and subsequent press conference at which the allegedly defamatory remarks were made. The parties subsequently filed supplemental memoranda addressing the constitutional issues, and plaintiffs filed a further "evidentiary memorandum" in support of their motion to vacate the scope of employment certification on non-constitutional grounds.

A second hearing was held on March 17, 1997. That hearing focused primarily on the constitutional issues raised by plaintiffs. Subsequently, the parties filed further memoranda concerning the legislative history of the Westfall Act.

III. FACTS

Except as otherwise noted, the following facts are undisputed. Edward M. Kennedy was in 1993, and remains, a United States Senator from Massachusetts. In November 1993, Senator Kennedy was the lead sponsor in the United States Senate of a pending bill, S. 636, entitled the "Freedom of Access to Clinic Entrances Act" (the "FACE Act" or "the Bill"). The Bill as ultimately enacted established federal criminal penalties and civil remedies for the use or threat of violence, physical obstruction, or destruction of property to interfere with access to facilities providing reproductive health care. See 18 U.S.C. § 248.

Senator Kennedy was also the Chairman of the Labor and Human Resources Committee, which had reported the Bill to the Senate, and was the manager for the legislation on the Senate floor, with responsibility for leading and organizing the debate in favor of the Bill. Senator Kennedy reported the Bill to the Senate on behalf of the Labor Committee on July 29,

1993. On Wednesday, November 10, 1993, the Senate agreed by unanimous consent to proceed to consideration of the Bill on the following Tuesday, November 16, 1993 at 8:00 a.m. From November 11 through November 15, 1993, the Senate was in recess for the Veteran's Day holiday and Senator Kennedy was away from Washington, D.C. During the holiday recess, Senator Kennedy and his staff continued to prepare for the Senate floor debate on the Bill.

On November 15, 1993, a campaign fundraising luncheon was held for Senator Kennedy at the Park Plaza Hotel in Boston. Senator Kennedy then planned to be a candidate for reelection in November 1994. The parties have stipulated that all expenses for the event were paid from Senator Kennedy's campaign fund. Senator Kennedy's wife, Victoria Reggie Kennedy, played a significant role in planning and orchestrating the event, which was billed as "Victoria Reggie Kennedy's Women's Luncheon Honoring Senator Edward M. Kennedy." Numerous elected officials were present, including, in addition to Senator Kennedy, five United States Senators. Also present were members of the media. Senator Kennedy did not separately address the media during the luncheon. Nor was there an opportunity during the luncheon for the media to pose questions to him.

Following the luncheon, Scott Ferson, a member of the Senator's staff, arranged for Senator Kennedy to be interviewed by the media.[8] The interview took place in a room adjacent to

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8. Ferson states in his affidavit that he arranged the interview in response to a number of requests by members of the media to speak with Senator Kennedy about the FACE Act and other topics. Ferson Decl. at ¶ 5. Plaintiffs contend that in the circumstances it is implausible to credit the claim that this

the ballroom in which the luncheon was held. Present in addition to Senator Kennedy were several reporters, television news camera crews, members of Senator Kennedy's campaign staff, Victoria Reggie Kennedy, and unidentified others.

Senator Kennedy responded to questions from the media concerning his campaign, business developments involving Delta Airlines and Logan Airport, the North American Free Trade Agreement, and the FACE Bill scheduled to be voted upon the next day. In response to a question from a member of the news media concerning the FACE Bill, Senator Kennedy made the following statement:

> Basically, this is legislation to deal with violence and constitutional rights. We're talking about access to a facility for a woman to be able to have her constitutional rights protected, but many of these facilities also provide extremely important services and preventative health care, prescreening, mammography, pap smears, and a number of other health-related items. So there's--people can have a difference on public policy issues, but when we have a national organization like Operation Rescue that has as a matter of national policy firebombing and even murder, that's unacceptable. This is a very targeted legislative remedy to deal with that kind of situation which exists in Massachusetts and in many other parts of the country. Massachusetts in the last two weeks has taken steps to address it and I think it's important that we did.

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media interview was not prearranged, or at least anticipated by Senator Kennedy's staff. Pl's. Evidentiary Memorandum at 9-12. Although this fact is not material, for the purposes of this motion, the court accepts plaintiffs' claim that the media interview was anticipated if not prearranged.

(emphasis added). This statement was repeated on November 16, 1993 by WBZ Television, Channel 4, in Boston, Massachusetts on its evening news program. Plaintiffs claim that the reference to Operation Rescue defames that organization and the individual plaintiffs who are prominent members of it.

The FACE Bill was considered by the Senate on November 16, 1993. It was enacted in May 1994. See 18 U.S.C. § 248.

IV. DISCUSSION

A. Operation Rescue Has Standing To Maintain this Action

The United States has not disputed plaintiffs' standing to bring this action. However, because the issue of standing relates to the court's subject matter jurisdiction, and because it is important that constitutional questions not be decided unnecessarily, the court has, sua sponte, considered the issue of plaintiffs' standing. The court concludes that Operation Rescue has standing and, therefore, the issues presented by this case must be decided notwithstanding the fact that the individual plaintiffs may lack standing.

To have standing under Article III, a plaintiff must show: (1) injury in fact; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, ----, 116 S.Ct. 1529, 1533, 134 L.Ed.2d 758 (1996). Operation Rescue is an unincorporated association. See Complaint ¶ 1. It has pled facts sufficient to satisfy the first two prongs of the test for standing.

With regard to the third prong, as defamation is a cause of action created by the common law of Massachusetts, Massachusetts law defines whether Operation Rescue may sue for defamation. The Massachusetts Supreme Judicial Court has held that a corporation may sue for libel and has indicated that

it would find that an unincorporated association has a cause of action for statements that wrongfully damage its reputation. See Finnish Temperance Soc. Sovittaja v. Publishing Co., 238 Mass. 345, 352-56, 130 N.E. 845 (1921). In Finnish Temperance the Supreme Judicial Court reasoned that a "corporation ... may have a reputation which is equally as valuable to it as to a natural person, and may be injured in that reputation in the same way." Id. at 353, 130 N.E. 845. The Court went on to note that, "'[T]he question is really the same by whomsoever the action is brought.'" Id. at 353-54, 130 N.E. 845 (quoting South Hetten Coat Company, Ltd. v. North-Eastern New Association, Ltd., (1894) 1 Q.B. 133, 138, 139, 140). The corporation, a temperance society, therefore was permitted to maintain an action for libel because "the good name of the plaintiff, if the ends for which it was incorporated are to be accomplished, is incidental to its very existence." Id. at 355, 130 N.E. 845.

This analysis is equally applicable to an unincorporated association like Operation Rescue. Thus, the court concludes that under the law of Massachusetts, as in other states, an unincorporated association may sue for defamation. See Washburn v. Wright, 261 Cal.App.2d 789, 793, 68 Cal.Rptr. 224 (1968) ("The rule generally accepted is that an unincorporated association has a cause of action for defamation in those circumstances in which a corporation has such a cause of action."); Kirkman v. Westchester Newspapers, 287 N.Y. 373, 380, 39 N.E.2d 919 (1942) ("The courts have no less a duty in [a case brought by an unincorporated association] than in a suit brought by a corporation or an individual, to protect good name [and] reputation ... from slanderous or libelous attacks.").

The individual plaintiffs, however, may lack standing to maintain this action. No individual was identified in Senator

Kennedy's remarks. Where, as here, an individual claim is based on alleged group defamation "an individual member of the defamed class cannot recover for defamation unless 'the group or class is so small that the matter can reasonably be understood to refer to the member, or ... the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.'" Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 430 n. 6, 583 N.E.2d 228 (1991) (quoting Restatement (Second) of Torts § 564A). The facts alleged in the complaint concerning the individual plaintiffs are insufficient to permit the court to determine if, at this stage of the litigation, they should be deemed to have standing. See Complaint ¶¶ 2-4, 9. If this issue were material, the court would permit them to amplify the record. However, because Operation Rescue has standing, and because the considerations that compel dismissal of Operation Rescue's case are equally applicable to the individual plaintiffs, it is not necessary or appropriate to resolve the question of their standing.

B. Standard of Review

The United States has filed a motion to dismiss this action pursuant to Fed.R.Civ.P. 12(b)(1). As discussed more fully below, the Westfall Act provides that an action against the United States pursuant to the FTCA shall be the exclusive remedy for torts committed by government employees in the course of their employment. See 28 U.S.C. § 2679(b)(1). The FTCA represents a limited waiver of the United States' sovereign immunity from tort liability based upon the actions of its employees. Block v. Neal, 460 U.S. 289, 294, 103 S.Ct. 1089, 1092, 75 L.Ed.2d 67 (1983). However, the FTCA expressly preserves the United States' sovereign immunity from suits for defamation and other specified torts. See 28 U.S.C. § 2680(h). Accordingly, if the substitution of the United States

as defendant in this action was proper, and the statute as applied is constitutional, the court lacks subject matter jurisdiction and plaintiffs' complaint must be dismissed. See 28 U.S.C. §§ 2674, 2679(b)(1); Aversa v. United States, 99 F.3d 1200, 1209 (1st Cir.1996); see also 14 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3654 (courts have no subject matter jurisdiction over causes of action barred by sovereign immunity).

The court reviews de novo the question whether the action in dispute was taken within the scope of the individual defendant's employment. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 421-25, 115 S.Ct. 2227, 2230-31, 132 L.Ed.2d 375 (1995); Palmer v. Flaggman, 93 F.3d 196, 198-99 (5th Cir.1996). "It is the plaintiff's burden to prove the existence of subject matter jurisdiction." Aversa, 99 F.3d at 1209 (citing Murphy v. United States, 45 F.3d 520, 522 (1st Cir.), cert. denied, 515 U.S. 1144, 115 S.Ct. 2581, 132 L.Ed.2d 831 (1995)). Generally, in determining whether subject matter jurisdiction exists, the court must "construe the Complaint liberally and treat all well-pleaded facts as true, according the plaintiff the benefit of all reasonable inferences," although a plaintiff "may not rest merely on 'unsupported conclusions or interpretations of law.'" Murphy, 45 F.3d at 522 (quoting Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 971 (1st Cir.1993)).

In addition, the court may permit limited discovery, consider whatever evidence has been submitted, such as depositions and exhibits, and make such findings as are necessary to determine its subject matter jurisdiction. See Rivera-Flores v. Puerto Rico Telephone Co., 64 F.3d 742, 748 (1st Cir.1995); Aversa, 99 F.3d at 1210; Nasuti v. Scannell, 906 F.2d 802, 808 (1st Cir.1990).

The court has applied the foregoing standards in this case.

Plaintiffs received the limited discovery they requested concerning the scope of employment issue, including the videotapes of the fundraising event and media interview. See Nov. 19, 1997 Tr. at 13; March 17, 1997 Tr. at 3. The parties agree that the facts necessary for the court's determination of the scope of employment issue are not in dispute, although plaintiffs contend that the media interview was part of a campaign event and ought to be viewed as such. Nov. 19, 1996 Tr. at 11-13. The court has considered the pertinent videotapes, which were played at the hearings. See Nov. 19, 1996 Tr. at 20; March 17, 1997 Tr. at 6. Thus, the court has all of the information necessary to determine the scope of employment issue.

Plaintiffs initially claimed, however, that they were entitled to additional discovery concerning the process and standards employed by the United States Attorney in certifying that Senator Kennedy was acting within the scope of his employment when he made the remarks at issue. As described in ¶ III.D, infra, at the November 19, 1996 hearing, the court expressed the view that such discovery was unnecessary because de novo review by the court renders immaterial any alleged defect in the certification of the United States Attorney, and plaintiffs' counsel agreed. See Nov. 19, 1996 Tr. at 40-41.

The questions whether the Westfall Act applies to members of Congress and, if so, whether it is unconstitutional as so applied are pure questions of law. Accordingly, all of the issues presented concerning the court's subject matter jurisdiction are ripe for resolution on defendant's motion to dismiss under Fed.R.Civ.P. 12(b)(1).

C. The Westfall Act

In 1988, the Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act, was enacted. The statute was a response to the Supreme Court's

1988 decision in Westfall v. Erwin, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619, which held that the judicially crafted doctrine of absolute, official immunity applied only to discretionary acts of government officials. See id. at 297, 108 S.Ct. at 584. The Westfall Act amended the FTCA to make an action against the United States the exclusive remedy for money damages for any injury arising from the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Thus, tort actions may no longer be maintained against federal employees in their individual capacities where the alleged tort was committed within the scope of employment. This is true even where, as in the case of an action for defamation, the doctrine of sovereign immunity precludes governmental liability.[9] United States v. Smith, 499 U.S. 160, 165-67, 111 S.Ct. 1180, 1184-86, 113 L.Ed.2d 134 (1991).

With regard to those protected, the Westfall Act provides that the term:

> "Employee of the government" includes officers and employees of any federal agency, [military personnel], and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

28 U.S.C. § 2671. The Act defines "federal agency" to include "the executive department, the judicial and legislative branches ..." Id.

Pursuant to the Act, in any civil action filed against a

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9. The FTCA provides, in pertinent part, that a FTCA remedy shall not be available for "any claim arising out of ... libel [or] slander ..." 28 U.S.C. § 2680(h).

federal employee, the Attorney General is empowered to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). The Attorney General has delegated this authority to the United States Attorneys. See 28 C.F.R. § 15.3(a).

Upon such certification:

> any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States ... and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

Upon certification, any action or proceeding ... shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA], and shall be subject to the limitations and exceptions applicable to those actions.

28 U.S.C. 2679(d)(2), (4).

D. This Case Should Not Be Remanded Because of Alleged Defects in the Certification Procedure

Plaintiffs contend that the Attorney General's scope of employment certification should be vacated because it "constitutes a mere conclusion and is neither candid, specific nor positive in allegations of fact," and because it fails "to show any possible causal connection between the original defendant's conduct and the scope of his employment." Pl's. Jan. 25, 1995 Motion to Remand at 2. However, as set forth below, neither a failure to provide an adequate statement of

reasons in support of the certification nor a lack of independence on the part of the certifying official provides grounds for the court to vacate the certification and remand this action to state court. Rather, the remedy for any defect in the United States Attorney's certification is de novo review by the court of the scope of employment issue.

In essence, the Westfall Act does not rely at all upon the integrity or correctness of the United States Attorney's decision to substitute the United States for an individual defendant based upon a finding that he or she was acting within the scope of employment in connection with the conduct at issue. As the Supreme Court has observed, "a U.S. Attorney, in cases of this order, is hardly positioned to act impartially." Gutierrez, 515 U.S. at 429, 115 S.Ct. at 2233. Evidently in recognition of this, under the Westfall Act there is an "absence of an obligation on the part of the Attorney General's delegate to conduct a fair proceeding, indeed any proceeding. She need not give the plaintiff an opportunity to speak to the 'scope' question, or even notice that she is considering the question. Nor need she give any explanation for her action." Id. at 429, 115 S.Ct. at 2234.

This does not, however, mean that a United States Attorney has unfettered discretion in deciding whether the United States should be substituted for an individual defendant. To the contrary, if challenged, he or she ultimately has no discretion with regard to this issue because the district court is obliged to review the scope of employment issue de novo, giving no deference to the United States Attorney's determination.[10] Id.

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10. As described in § III.E, infra, the plaintiff has the burden of proving that the United States Attorney's decision was incorrect. See Rogers v. Management Technology, Inc., 123 F.3d 34, 36-37 (1st Cir.1997).

at 433- 37, 115 S.Ct. at 2236-37; see also Aversa, 99 F.3d at 1208-10; Palmer, 93 F.3d at 198-99. Accordingly, "the Attorney General's scarcely disinterested certification on the matter [of the proper defendant] is by statute made the first, but not final word." Gutierrez, 515 U.S. at 432, 115 S.Ct. at 2235.[11]

Therefore, plaintiffs do not have a right to a remand, or reinstitution of Senator Kennedy as the defendant, based upon any alleged procedural deficiency in the United States Attorney's decision that the United States is the proper defendant in this case. Rather, the remedy for purported imperfections in the certification process is the de novo review by the court which they have received.

E. Senators are Covered By The Westfall Act

Plaintiffs contend that Senators are not covered by the Westfall Act because they are members of Congress rather than officers or employees of the legislative branch. As set forth below, plaintiffs rightly recognize that the Constitution and some statutes have made a distinction between members of Congress and its officers and employees. There are other statutes, however, which treat Senators and Representatives as officers and employees of the government; Senators are elected by the people, but employed in the legislative branch and, therefore, fit within the literal definition of "employee of the government;" and legislative history indicates that Congress

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11. The United States Attorney's certification is, however, dispositive of whether the case will proceed in state or federal court. Even if the district court determines the United States Attorney erred, the case remains in federal court. See 29 U.S.C. § 2679(d)(2); Gutierrez, 515 U.S. at 431-35, 115 S.Ct. at 2235-36; Rogers, 123 F.3d at 36-37.

understood the Westfall Act to cover its members. In the sole case addressing this issue, the Fifth Circuit concluded that members of Congress are "employees of government" and are entitled to the immunity provided by the Westfall Act. See Williams v. United States, 71 F.3d 502, 504 (5th Cir.1995). This court agrees that conclusion is correct.

As described earlier, the Westfall Act provides immunity for "any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1); see also Aversa, 99 F.3d at 1208 ("The Westfall Act provides that a federal employee is immune if he or she acted 'within the scope of his office or employment.'"). "'Employee of the government' includes officers and employees of any federal agency ..." 28 U .S.C. § 2671. "Federal agency" includes "the executive department, the judicial, and legislative branches ..." Id.

As plaintiffs point out, the framers of the Constitution followed a consistent practice of using the term "officer" to refer to appointed agents of government, in contrast to their use of the terms "Member," "Representative" or "Senator" to refer to legislators. See U.S. Const. art. I, §§ 3, 5 and 6 and Art. II, §§ 2, 3 and 4. In contrast to the FTCA, the Constitution does not utilize the term "employee" at all.

Plaintiffs are also correct that there are several instances in which later lawmakers have followed the taxonomy set out in the Constitution. 2 U.S.C. § 60-1(b), for example, defines "Officer of the Congress" as "an elected officer of the Senate or House of Representatives who is not a Member of the Senate or House ..." (emphasis added). In addition, Title V of the United States Code distinguishes among "Employees," "Officers," and "Members of Congress" for certain purposes, see 5 U.S.C. § 2104-06, as does the Internal Revenue Code. See 26 U.S.C. § 7701(j) and (k). See also S.Res. 492, 97th

Cong. (1982), discussed infra, n. 8, (authorizing Sergeant at Arms of Senate to process claims brought "for the negligent or wrongful act or omission of any Member, Officer, or employee of the Senate ...").

Contrary to plaintiff's claim, however, the term "officer" has been employed in other statutes to describe Senators and Representatives, among others. In Lamar v. United States, 241 U.S. 103, 111-12, 36 S.Ct. 535, 537-38, 60 L.Ed. 912 (1916), the Supreme Court determined that a member of the House of Representatives was an "officer of the government" within the meaning of a penal statute making it a crime to "falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the government thereof...." In holding that the statute included members of Congress the Supreme Court noted that, as in the instant matter, "the issue here is not a constitutional one, but who is an officer ... within the provisions of" a particular statute. Id. at 112, 36 S.Ct. at 538.

In Lamar, the Supreme Court stated that it was "clearly of the opinion that such members are embraced by the comprehensive terms of the statute," id. at 112, 36 S.Ct. at 538:

> (a) Because prior to and at the time of the original enactment in question the common understanding that a member of the House of Representatives was a legislative officer ... was clearly expressed in the ordinary, as well as legal, dictionaries;
>
> (b) Because at or before the same period in the Senate of the United States, after considering the ruling in the Blount Case[12] it was concluded that a member of Congress was a

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12. As described in Lamar, in the Blount case, Whart.St.Tr. p. 200, it was held that "a Senator of the United States was not

> civil officer of the United States within the purview of the law requiring the taking of an oath of office; [and]
> (c) Because also in various general statutes of the United States at the time of the enactment in question a member of Congress was assumed to be a civil officer of the United States.

Id. at 113, 36 S.Ct. at 538 (citations omitted). The Supreme Court also noted that treating Senators and Representatives as "officers" of Congress "harmonizes with the settled conception of the position of members of state legislative bodies as expressed in many state decisions." Id.

Senators and Representatives have also been deemed to be "officers" of Congress for the purpose of 28 U.S.C. 1442(a)(1), which authorizes removal of a civil or criminal action brought in state court against "[a]ny officer of the United States or any agency thereof ... for any act under color of such office ..." See Richards v. Harper, 864 F.2d 85, 86-7 (9th Cir.1988); Maddox v. Williams, 855 F.Supp. 406, 409 (D.D.C.), aff'd 62 F.3d 408 (D.C.Cir.1995); Hill Parents Ass'n. v. Giaimo, 287 F.Supp. 98, 99-100 (D.Conn.1968); Preston v. Edmondson, 263 F.Supp. 370, 372 (N.D.Okla.1967). In Hill Parents Ass'n, the court also noted that in addition to subsection (a)(1), members of Congress are also treated as "officers" of Congress in 28 U.S.C. § 1442(a)(4), which authorizes removal of actions brought in state courts against "[a]ny officer of either House of Congress, for any act in the discharge of his official duty under an order of such House." 287 F.Supp. at 99.

Moreover, it remains true that, as the Supreme Court

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a civil officer subject to impeachment within the meaning of § 4 of article 2 of the Constitution." 241 U.S. at 112, 36 S.Ct. at 538.

observed in Lamar, 241 U.S. at 113, 36 S.Ct. at 538, interpreting a Senator to be an officer of Congress for the purpose of the Westfall Act would be consistent with the customary understanding of that term as reflected by its definition in standard dictionaries. For example, Webster's Third New International Dictionary (1981), at 1567, defines "officer," in part, as: "one who holds an office[ ]; one who is appointed or elected to serve in a position of trust, authority, or command." The Random House Dictionary of the English Language, (2d ed.1987), at 1344-45, defines "officer," in part as "a person appointed or elected to some position of responsibility or authority in the government...."[13] Similarly, a leading legal dictionary, Black's Law Dictionary (6th ed.1990), at 900, defines a "legislative officer" as "[o]ne of those whose duties relate mainly to the enactment of laws, such as members of congress and of the several state legislatures." (emphasis added).

Although not perfectly clear on the issue, the relevant legislative history also supports the conclusion that the Westfall Act intended to provide immunity to Senators and Representatives. This issue is not addressed directly in the 1988 House Committee on the Judiciary Report concerning the legislation, H.R.Rep. No. 700, 100th Cong., 2nd Sess.1988, 1988 WL 169931, reprinted in 1988 U.S.C.C.A.N. 5945, and the Senate did not issue a report. However, there is evidence that two years later, in 1990, the House of Representatives Committee on the Judiciary viewed the Westfall Act as covering members of Congress, as well as the "rank and file"

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13. The Oxford English Dictionary (2d ed.1989), at 132, defines officer, in part, as "a person authoritatively appointed or elected to exercise some function pertaining to public life."

employees that it was primarily intended to protect.[14] More specifically, a 1990 House Report concerning a proposed amendment to the Westfall Act dealing with certification and defense of tort claims against House personnel states:

> Since enactment of the Westfall bill, there has been concern as to whether it is consistent with the principles of separation of powers under the Constitution for the Attorney General to determine when Members of Congress and their employees are acting within the scope of employment. There also has been concern about whether it is appropriate for the Attorney General to defend Members and their employees in all such cases.

H.R.Rep. No. 1015, 101st Cong., 2d Sess.1990, 1991 WL 4376, at *293-94. To avoid these potential separation of powers problems, the bill, if enacted, would have amended the certification provisions of the FTCA to provide that:

> in the event a tort claim is filed against a Member or employee of the United States House of Representatives, the Speaker of the House would determine if that individual was acting within the scope of employment in performing the acts subject to such tort claim.

Id. at *295. Thus, it is clear that in 1990, the House Committee

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14. In its 1988 report concerning the Westfall Act, the House Committee on the Judiciary expressed concern that the Supreme Court's decision in Westfall, 484 U.S. at 292, 108 S.Ct. at 581, which held that absolute, official immunity applied only to "discretionary" acts of government officials, id., at 299, 108 S.Ct. at 585, would "have its most severe impact on lower-level employees; that is, the 'rank and file' workers who are least likely to exercise discretion in carrying out their duties." 1988 WL 169931, at *2.

on the Judiciary, which authored the report, understood the FTCA to apply to Members of Congress as well as lower-level employees.[15]

The House, however, evidently had a different understanding of the coverage of the FTCA prior to the enactment of the Westfall Act. In its 1988 Report, the House Committee on the Judiciary stated that the Westfall Act was intended to, among other things, "explicitly extend[ ] the coverage of the FTCA to officers and employees of the legislative and judicial branches," and that "[t]he FTCA currently covers employees of the Executive Branch only." 1988 WL 169931, at *4. But see McNamara v. United States, 199 F.Supp. 879 (D.D.C.1961) (holding that FTCA applied to all three branches of government); United States v. LePatourel, 571 F.2d 405 (1978), modified on reh'g en banc, 593 F.2d 827 (8th Cir.1979) (holding that judiciary and federal judges were covered by the FTCA). See contra Foster v. Bork, 425 F.Supp. 1318, 1319-20 (D.D.C.1977) (judiciary not covered by FTCA); Foster v. MacBride, 521 F.2d 1304, 1305 (9th Cir.1975) (same); Cromelin v. United States, 177 F.2d 275, 277 (5th Cir.1949), cert. denied, 339 U.S. 944, 70 S.Ct. 790, 94 L.Ed. 1359 (1950) (neither federal district judge nor court-appointed trustee covered by FTCA).

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15. Indeed, a 1982 Senate Resolution authorizing the Sergeant at Arms of the Senate to process claims for money damages against the United States arising out of "the negligent or wrongful act or omission of any Member, Officer, or employee of the Senate while acting within the scope of his office or employment," S.Res. 492, 97th Cong. (1982), indicates that the Senate believed prior to the Westfall Act that the FTCA protected its members.

"Although subsequent legislative history is less authoritative than contemporaneous explanation," it is nonetheless "entitled to great weight in statutory construction." Roosevelt Campobello International Park Commission v. EPA, 711 F.2d 431, 436-37 (1st Cir.1983) (citation omitted). Where the contemporaneous legislative history is ambiguous or fails to speak directly to an issue, it is particularly appropriate for the court to consider subsequent statements. See Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596, 100 S.Ct. 800, 814, 63 L.Ed.2d 36 (1980) ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, ... such views are entitled to significant weight, ... and particularly so when the precise intent of the enacting Congress is obscure.") (citations omitted). This court recognizes that Congress did not enact the amendment being addressed in 1990, and thus the weight of the House Report may be diminished. That report, however, is consistent with the claim that the Westfall Act applies to Senators and Representatives.

Significantly, the Court of Appeals for the Fifth Circuit--the sole Court of Appeals to address this issue--found that the Westfall Act protected a Congressman charged with making defamatory statements because:

> A Member of Congress who holds an office in the U.S. House of Representatives is clearly an employee or officer of the legislative branch of the federal government. The plain language of the statute thus suggests that Members of Congress are employees of the government, for "[s]ection 2679(b)(1) applies without exception to 'any employee of the Government,' and section 2671, as amended by the Westfall Act, provides that officers and employees of the [legislative branch] are encompassed within that phrase." If Congress intended to exclude Members of Congress from

> the protection of the FTCA, it could have expressly done so within the language of the Act. Therefore, we find that as an employee of the government as defined under the FTCA, [the Congressman] is eligible for coverage if his conduct at issue was within the scope of his employment.

Williams, 71 F.3d at 504-5 (quoting Sullivan v. United States, 21 F.3d 198, 202 (7th Cir.), cert. denied, 513 U.S. 1060, 115 S.Ct. 670, 130 L.Ed.2d 604 (1994)).

As indicated in Williams, the Court of Appeals for the Seventh Circuit in Sullivan held that "[s]ection 2679(b)(1) [which makes the FTCA the sole remedy in certain cases] applies without exception to 'any employee of the government.'" 21 F.3d at 202. The court went on to hold that because "[l]iterally, federal public defenders are federal employees," the "plain language of the statute" suggested that they were also within the coverage of the Act. Id. This analysis is, as the Fifth Circuit found in Williams, also applicable to members of Congress.

In view of the foregoing, this court too concludes that by virtue of the Westfall Act the FTCA provides immunity for Senator Kennedy for any allegedly defamatory statement that he made within the scope of his employment.

E. Senator Kennedy's Remarks Were Made Within the Scope of His Employment

Plaintiffs claim that even if members of Congress are covered by the Westfall Act in some circumstances, Senator Kennedy is not protected in this case because his remarks regarding Operation Rescue were not made within the scope of his employment. This claim, however, is also incorrect.

The question whether a federal employee's actions fall within the "scope of ... office or employment" is to be determined with reference to the respondeat superior law of the state in which the alleged tort occurred--in this case

Massachusetts. Aversa, 99 F.3d at 1208; Kelly v. United States, 924 F.2d 355, 357 (1st Cir .1991); H.R.Rep. No. 700, 100th Cong., 2d Sess.1988, 1988 WL 169931, at *5, reprinted in 1988 U.S.C.C.A.N. 5945, 5949. "[I]n situations such as this one, where a plaintiff asserts that a defendant acted outside the scope of his or her employment despite the Attorney General's certification to the contrary, the burden of proof is on the plaintiff." Rogers v. Management Technology, Inc., 123 F.3d 34, 37 (1st Cir.1997); see also Aversa, 99 F.3d at 1209.

In Massachusetts, the "conduct of an agent is within the scope of employment (1) if it is of the kind he is employed to perform; (2) if it occurs substantially within the authorized time and space limits; and (3) if it is motivated, at least in part, by a purpose to serve the employer." Kelly v. United States, 924 F.2d 355, 357 (1st Cir.1991) (quoting Wang Laboratories, Inc. v. Business Incentives, Inc., 398 Mass. 854, 859, 501 N.E.2d 1163 (1986)).

Contrary to plaintiffs' contention, Massachusetts law does not provide that an "intentional tort" such as defamation may never be within the scope of an individual's employment. The Court of Appeals for the First Circuit has recognized that "an intentional tort ... can be within the scope of employment if state respondeat superior law so requires." Aversa, 99 F.3d at 1209. Under Massachusetts law, defamatory statements may be found to have been made within the scope of an individual's employment. See Howard v. Town of Burlington, 399 Mass. 585, 591, 506 N.E.2d 102 (1987) (holding town official's allegedly defamatory statements were made within the scope of her employment for purposes of state indemnification statute); Kelly, 924 F.2d at 357 (holding that, under Massachusetts law, a federal Drug Enforcement Administration agent's allegedly defamatory statements were made within the scope of his employment). Whether the alleged defamation was committed

within the scope of an individual's employment is determined by operation of the Wang test. Howard, 399 Mass. at 589, 506 N.E.2d 102; Kelly, 924 F.2d at 357.

The first prong of the Wang test requires a determination of the duties a person is employed to perform. 398 Mass. at 859, 501 N.E.2d 1163. Plaintiffs insist that for a Senator these duties extend no further than to "the essential elements of the legislative process, namely, speech, debate, and deliberation" undertaken within the legislative chambers. Pl.'s Aug. 14, 1996 Mem. at 3. This assertion is incorrect.

Under Massachusetts law, "it is ordinarily the actual and customary, rather than formally described, duties which determine scope of employment." Howard, 399 Mass. at 590, 506 N.E.2d 102. In addition, "[t]he scope of an employee's employment is not construed restrictively." Id. (citing Commonwealth v. Jerez, 390 Mass. 456, 461-62, 457 N.E.2d 1105 (1983)).

Because Senator Kennedy is a federal official, federal law defines the "nature and contours of his ... federal responsibilities." Aversa, 99 F.3d at 1209; see also Platis v.. United States, 409 F.2d 1009, 1011 (10th Cir.1969). The duties of members of Congress enumerated in the Constitution are very few.[16] Such duties do not, for example, include the

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16. U.S. Const. art. I, § 5, cl. 1 provides:

> Each House shall be the Judge of its own Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as

duties to debate and vote on proposed legislation.

It has been widely recognized by the federal courts, however, that a member of Congress' official duties extend well beyond those enumerated in the Constitution and the additional responsibilities protected by the Speech or Debate Clause, Art. I, § 6. For example, in United States v. Brewster, 408 U.S. 501, 512, 92 S.Ct. 2531, 2537, 33 L.Ed.2d 507 (1972), the Supreme Court stated:

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases and speeches delivered outside the Congress. The range of these related activities has grown over the years.

The Supreme Court noted that these "official duties" are "expected by constituents" and are "entirely legitimate." Id. See also Chastain v. Sundquist, 833 F.2d 311, 314 (D.C.Cir.1987) (holding that Speech or Debate Clause does not provide immunity for acts, such as letter-writing, which are "taken in a member's 'official capacity'" but which are not integral parts of the actual process of legislation).

Most significantly, in Williams, a case closely analogous to the instant action, holding that allegedly defamatory statements made in the course of an interview by the media were within the scope of a Congressman's duties under Texas principles of agency, the Court of Appeals for the Fifth Circuit identified a similarly broad range of official duties pertaining to members

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each House may provide.

of Congress:

> Members of Congress traditionally communicate to the public about issues of law, often expressing their concerns and opinions about the need to change the laws. Indeed, the legislative duties of Members of Congress are not confined to those directly mentioned by statute or the Constitution. Besides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents. Such service necessarily includes informing constituents and the public at large of issues being considered by Congress.

Williams, 71 F.3d at 507.

In making the remarks now claimed to be defamatory, Senator Kennedy was informing his constituents and the general public of his view on pending legislation scheduled to be considered by the Senate the next day. Such statements were "of the kind he [was] employed to perform." Wang, 398 Mass. at 859, 501 N.E.2d 1163. Thus, the first prong of the Wang test is satisfied.

In the present case, the analysis concerning the second and third prongs of the Wang test--whether the conduct in question occurred substantially within authorized time and space limits and whether it was motivated, at least in part, by a purpose to serve the employer, 398 Mass. at 859, 501 N.E.2d 1163--is substantially similar. In essence, plaintiffs contend that the remarks at issue were made in connection with a fundraising event and were motivated by a desire to generate campaign funds and votes for Senator Kennedy. Thus, plaintiffs claim that the comments in question fail to satisfy the final elements of the Wang test and should be deemed to have been made outside of the scope of Senator Kennedy's duties as a member of Congress.

As indicated earlier, at this stage of this litigation the court is required to "indulg[e] all reasonable inferences in favor of the plaintiff." Aversa, 99 F.3d at 1210. The court may, however, consider whatever evidence has been furnished in this case, and hold evidentiary hearings to resolve immunity-related factual disputes. Id.; Nasuti, 906 F.2d at 808. The court has held such hearings and has considered the only evidence that plaintiffs proffered--the videotapes. From that process, certain undisputed facts emerge, including the following.

The remarks at issue were made in Massachusetts, the home of Senator Kennedy's constituents. They were not made gratuitously in Senator Kennedy's speech at the fundraising event. Rather, they were made in response to questions posed by the media, in a room adjoining the ballroom in which the fundraiser was held, immediately following that event. The primary audience for Senator Kennedy's remarks regarding Operation Rescue was members of the media, although the court assumes that some of the unidentified individuals in the videotape attended the fundraiser and also heard them. Senator Kennedy's comments related to the Bill which he was leading the effort to have the Senate vote favorably upon the next day, November 16, 1993. Senator Kennedy was not up for reelection until November 1994.

For the reasons described earlier, plaintiffs' claim that the sole authorized place for the performance of Senator Kennedy's duties was the United States Senate in Washington, D.C. is incorrect. It is customary and proper for Senators to address the merits of pending legislation, in the response to members of the media, while in their home states. The fact that in this case the remarks in question were made immediately following a fundraising event does not qualify the conclusion that the second prong of the Wang test is satisfied.

Looking at the evidence in the light most favorable to plaintiff, the court infers for present purposes that one motive for Senator Kennedy's remarks about Operation Rescue was to enhance his popularity in Massachusetts. The court also infers that such enhanced popularity would facilitate fundraising for Senator Kennedy's reelection campaign and ultimately help generate the votes he needed to remain in office. At the same time, however, he was making statements that would inform his constituents and others of his position concerning the merits of the FACE Bill and the reasons its enactment was, in his view, required. Thus, Senator Kennedy was providing political leadership and a basis for voters to judge his performance in office--two activities that public officials are expected, and should be encouraged, to perform. See, e.g., Williams, 71 F.3d at 507. Such personal and public motives are often closely related. It is natural for public officials to believe that their own success, and that of their political parties, is inextricably linked with the public interest.

Under Massachusetts law, "the fact that the predominant motive of the [employee] is to benefit himself does not prevent the act from coming within the scope of employment as long as the act is otherwise within the purview of his authority." Wang, 398 Mass. at 859-60, 501 N.E.2d 1163; see also Rogers, 123 F.3d at 38. Only "[i]f an employee 'acts from purely personal motives ... in no way connected with the employer's interests, [is] he considered in the ordinary case to have departed from his employment, and the master is not liable.'" Pinshaw v. Metropolitan District Commission, 402 Mass. 687, 694-95, 524 N.E.2d 1351 (1988) (quoting W. Prosser & W. Keeton, Torts 506 (5th ed.1984)). It is clear that this is not such a case and that no reasonable factfinder could conclude otherwise.

Accordingly, the Westfall Act provides Senator Kennedy

immunity for his remarks regarding Operation Rescue unless that statute is unconstitutional as applied to a United States Senator. It is, therefore, necessary for the court to decide whether the Westfall Act is unconstitutional as applied in this case.

F. The Westfall Act is Constitutional as Applied to Members of Congress Acting Within the Scope of Their Employment

The parties agree that Senator Kennedy's comments concerning Operation Rescue are not protected by the Speech or Debate Clause of the Constitution, Art. 1, § 6, cl. 1, or the judicially crafted doctrine of absolute, official immunity. Their understanding is correct. Hutchinson v. Proxmire, 443 U.S. 111, 113, 99 S.Ct. 2675, 2677, 61 L.Ed.2d 411 (1979); National Association of Social Workers v. Harwood, 69 F.3d 622, 630 (1st Cir.1995); Williams v. Brooks, 945 F.2d 1322, 1331 (5th Cir.1991); Chastain v. Sundquist, 833 F.2d 311, 314, 317 (D.C.Cir.1987). The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." Art. 1, § 6, cl. 1. This provision "protects all lawmaking activities undertaken in the House and Senate, but affords no constitutional immunity beyond its carefully defined scope." Chastain, 833 F.2d at 314; see also National Association of Social Workers, 69 F.3d at 630. The absolute, official immunity of members of Congress is coextensive with the scope of immunity provided by the Speech or Debate Clause. Chastain, 833 F.2d at 316; Williams, 945 F.2d at 1327. Accordingly, absent the Westfall Act, Senator Kennedy would be subject to this suit by Operation Rescue for defamation because it is based on statements made outside of Congress. National Association of Social Workers, 69 F.3d at 630; Williams, 945 F.2d at 1331; Chastain, 833 F.2d at 314-

16; Hutchinson, 443 U.S. at 127, 99 S.Ct. at 2684.

As described earlier, however, the Westfall Act expands immunity for members of Congress to provide protection for all acts taken by them within the scope of their employment. Plaintiffs assert that as applied to members of Congress, the Westfall Act is unconstitutional. As described, infra, there are not in this case circumstances requiring heightened scrutiny. Thus, the Westfall Act, as "an act of Congress [is] clothed with a presumption of constitutionality, and the burden is on the plaintiff to show that it [is unconstitutional]." Hammond v. United States, 786 F.2d 8, 12 (1st Cir.1986) (upholding validity of federal statute substituting United States as defendant in suits against private contractors for radiation injuries, and making the Federal Tort Claims Act the sole remedy for those injuries). More specifically, the plaintiff must prove that the statute is unconstitutional as applied in this particular case. Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 2914-15, 37 L.Ed.2d 830 (1973); United States v. Ferrara, 771 F.Supp. 1266, 1282-83 (D.Mass.1991).

In essence, Operation Rescue contends that to the extent that the Westfall Act provides immunity to members of Congress for conduct that is not protected by the Speech or Debate Clause it is unconstitutional because the Constitution does not expressly authorize such legislation and the Speech or Debate Clause prohibits it. This contention is incorrect.

It is true that the Constitution creates a federal government of limited powers. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, at 137 (Roy P. Fairfield, ed., 2d ed.1981). See also U.S. Const. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the

States, are reserved to the states respectively, or to the people.") As explained in detail by the Court of Appeals for the District of Columbia in Chastain, among the powers that remained with the states after enactment of the Constitution was the power to provide a remedy for defamatory statements made by a Senator in his home state even though he would have had immunity if the same statements had been made in the Senate. 833 F.2d at 316-26; see also Doe v. McMillan, 412 U.S. 306, 311-25, 93 S.Ct. 2018, 2024-31, 36 L.Ed.2d 912 (1973).

This does not necessarily mean, however, that Congress lacks the power to expand by statute the immunity for its members provided by the Constitution. Article I, § 1 of the Constitution provides that: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Article I, § 8 enumerates seventeen specific powers granted to Congress and also provides that Congress has the power:

> (18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

(emphasis added). Therefore, as clearly manifested by its express terms:

> The necessary and proper clause attaches not only to the enumerated congressional powers of Article I, § 8, but also to "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Thus it broadens the legitimate ends of congressional action well beyond those ancillary to the explicit legislative grants of Article I.

Laurence H. Tribe, American Constitutional Law, § 5-3, at 304

(2d ed.1988). Accordingly, this court concludes, contrary to Operation Rescue's contention, that the authority provided by the Necessary and Proper Clause applies to the general power to legislate vested in Congress by Article I, § 1, as well as to the seventeen subjects of legislation particularly described prior to that clause in Article I, § 8. See United States v. Maryland, 488 F.Supp. 347, 356 (D.Md.), aff'd, 636 F.2d 73 (4th Cir.1980), cert. denied, 451 U.S. 1017, 101 S.Ct. 3005, 69 L.Ed.2d 388 (1981) (finding federal statute exempting members of Congress from state taxes to be constitutional).

The classic statement of the meaning of the Necessary and Proper Clause was provided in 1819 by Chief Justice John Marshall in M'Culloch v. Maryland, 17 U.S. at 404. In M'Culloch, the Supreme Court addressed whether the powers delegated to Congress by the Constitution included the authority to incorporate a national bank. Beginning with the principle that the federal government is one of enumerated powers, Chief Justice Marshall conceded that there is no constitutional provision expressly granting Congress the power to charter a bank. He observed, however, that Article I, § 8 gave Congress the power "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war ..." 17 U.S. at 408. Implied in this express grant of authority, he held, was the grant of such further authority as is necessary "to facilitate its execution." Id. at 408. The textual source of these implied powers he located in the Necessary and Proper Clause.

Turning to the construction of that clause, the Chief Justice rejected the state of Maryland's argument that the term "necessary" should be construed strictly. Rather, he wrote:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited,

> but consistent with the letter and spirit of the constitution, are constitutional.

Id. at 421.

More recently, the Supreme Court has characterized the scope of the lawmaking power created by the Necessary and Proper Clause as "expansive." INS v. Chadha, 462 U.S. 919, 983, 103 S.Ct. 2764, 2804, 77 L.Ed.2d 317 (1983). This is true, in part because, as Justice Marshall wrote in 1819:

> [T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

17 U.S. at 421. In 1983, in Chadha, the Supreme Court considered our constitutional history since M'Culloch and found that:

> It is long-settled that Congress may "exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government," and "avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

462 U.S. at 983, 103 S.Ct. at 2801 (quoting M'Culloch, 17 U.S. at 415- 16, 420); see also Hodel v. Virginia Surface Mining, 452 U.S. 264, 276-77, 101 S.Ct. 2352, 2360-61, 69 L.Ed.2d 1 (1981); Oregon v. Mitchell, 400 U.S. 112, 286, 91 S.Ct. 260, 345, 27 L.Ed.2d 272 (1970) (concurring opinion); Hanna v. Plumer, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144-45, 14 L.Ed.2d 8 (1965). Thus, one modern commentator has written:

> In practice, the Supreme Court will accord the more democratic branches of the federal government great deference ... So long as it would be reasonable for the Congress to view a problem as connected to one of the

> Constitution's grants of power, the law will be upheld, unless Congress' power is limited by the Bill of Rights or other specific restrictions.
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> * * * * * *
>
> Today the test for validity of a federal act is whether the Congress might reasonably find that the act relates to one of the federal powers. So long as the act bears some reasonable relationship to a grant of power to the federal government, the law must be upheld; if the act arguably relates to such an end, then it is valid so long as it does not violate a specific check on governmental actions such as those contained in the Bill of Rights.

Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 3.3, at 307-09 (2d ed.1992). See also Tribe, American Constitutional Law, § , 5-3, at 301 ("The exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power does not conflict with external limitations such as those of the Bill of Rights and of federalism.").

In this case, the purpose of the Westfall Act as it applies to members of Congress is legitimate. The court recognizes that there are no Congressional findings directly addressing the perceived need to expand the immunity afforded by the Speech or Debate Clause, but such findings are not required. See United States v. Lopez, 514 U.S. 549, 561-63, 115 S.Ct. 1624, 1631, 131 L.Ed.2d 626 (1995). Rather, in contrast to Lopez, the legitimate basis for the legislation at issue is "visible to the naked eye." Id. at 563, 115 S.Ct. at 1632.[17]

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17. In Lopez, the Supreme Court struck down the Gun-Free School Zones Act because that statute no bore no "visible"

As the Supreme Court has recently written: "In cases involving prosecutors, legislators, and judges [it has] repeatedly explained that immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." Clinton v. Jones, --- U.S. ----, ----, 117 S.Ct. 1636, 1643, 137 L.Ed.2d 945 (1997). In essence, "'The point of immunity for [public] officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.'" Id. (quoting Ferri v. Ackerman, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979)).

The cases previously cited which held that neither the Speech or Debate Clause nor the judicially crafted concept of absolute, official immunity applied to the statements of Senators or Representatives made outside of Congress demonstrate that there is a rational basis for extending that immunity by legislation. "[A] primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents. Such service necessarily includes informing constituents and the public at large of issues being considered by Congress." Williams, 71 F.3d at 507. Similarly, there is plainly a public interest in having Senators and Representatives with expertise on certain issues communicate their views to officials of the Executive Branch with related responsibilities.

Nevertheless, prior to the Westfall Act it was properly held that Senator William Proxmire could be sued for defamation

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relation to interstate commerce and thus could not be sustained as a valid exercise of Congressional power pursuant to the Commerce Clause. 514 U.S. at 563- 69, 115 S.Ct. at 1632-34.

based on a press release announcing the presentation of his "Golden Fleece Award," which was intended to publicize what he perceived to be egregious examples of wasteful government spending, to a researcher who was funded to study why monkeys clench their jaws. Hutchinson, 443 U.S. at 114-17, 133, 99 S.Ct. at 2677-79, 2687. Similarly, prior to the Westfall Act Congressman Jack Brooks was found subject to suit for stating in a television interview that public funds should not be appropriated to pay a private fundraiser for a battleship restoration project in his district. Williams, 945 F.2d at 1323-24, 1330. In addition, lacking legislated immunity, Congressman Don Sundquist was deemed potentially liable for libel based on letters he sent to the Attorney General and the Legal Services Corporation complaining about the performance of a publicly funded program in his district. Chastain, 833 F.2d at 312-13.

In view of the foregoing, it was reasonable for Congress to conclude that its members would be aided in their effort to inform their constituents, to provide leadership on issues of public importance and, in the process of being more candid and forthcoming, to be more readily accountable to those who elected them if they were not inhibited by the threat of lawsuits and liability for the statements they made outside of Congress in performing these functions.

The Supreme Court and lower courts have generally assumed that it is permissible for Congress and the President to enact legislation expanding their own immunity, and the exercise of the authority to expand the constitutional protection of members of Congress has been upheld in the only case directly addressing the issue. See Clinton, --- U.S. at ----, 117 S.Ct. at 1652; Williams, 945 F.2d at 1331; Chastain, 833 F.2d at 327; United States v. Maryland, 488 F.Supp. at 356-57, 636 F.2d at 74. More specifically, in Clinton, in rejecting the

argument that the President is entitled to constitutional immunity while in office for civil suits arising out of his unofficial acts, the Supreme Court stated that "[i]f Congress deems it appropriate to afford the President stronger protection" against the risk of burdensome and vexatious litigation, "it may respond with appropriate legislation." Clinton, --- U.S. at ----, 117 S.Ct. at 1652.

Similarly, in Williams, the Court of Appeals for the Fifth Circuit, in holding that members of Congress were not entitled to common law immunity for defamatory statements made outside the legislative chambers, stated:

> We are in any event powerless under [Doe v.] McMillan to expand official immunity as Congressman Brooks requests. We also observe that members of the legislative branch, unlike members of the other coordinate branches of the federal government, have the unique power to pass a law giving themselves immunity from suit. Accordingly, it may be appropriate that any grant to them of more expansive absolute immunity than that already written into the Constitution come about by legislation rather than by judicial decision.

945 F.2d at 1331.

The Court of Appeals for the District of Columbia Circuit also declined to expand legislative immunity judicially in part because:

> Unlike members of the executive or judicial branches, members of Congress have the unique ability to enact legislation. In this capacity, congressional power could be hypothesized to exist to enact legislation immunizing members of Congress from common law torts.
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> * * * * * *
>
> If members of Congress in fact believe they require the protection of official immunity, let them so declare and

stand accountable to the people for their action.
Chastain, 833 F.2d at 327.

Both the Courts of Appeals for the Fifth and District of Columbia Circuits recognized that a statutory expansion of legislative immunity might be subject to constitutional attack. Williams, 945 F.2d at 1331 n. 9 ("Whether, or in what circumstances, such a grant of immunity could constitutionally override state defamation law is perhaps another question."); Chastain, 833 F.2d at 327 ("We have no occasion to judge whether such a power, if asserted, would pass constitutional muster."). However, in its second Williams decision, the Court of Appeals for the Fifth Circuit enforced the Westfall Act and barred the plaintiff's defamation action against Congressman Brooks without addressing, let alone deciding, whether the legislation was unconstitutional as applied. 71 F.3d at 506-07.

The general power of Congress to expand the protection of its members by statute was explicitly recognized in United States v. Maryland, 488 F.Supp. at 356-57, 636 F.2d at 74. That case involved the constitutionality of a federal law exempting a member of Congress from taxation by any state in which he or she maintained a residence for the purpose of attending to the member's duties in Washington, D.C. In an opinion adopted by the Court of Appeals for the Fourth Circuit, 636 F.2d 73, the district court held the statute to be constitutional because Article I, § 1 vested the power to legislate in Congress and the statutory exemption from certain state taxation was a permissible exercise of the authority of Congress, expressly established by the Necessary and Proper Clause, to decide what laws are appropriate to facilitate the exercise of its power to legislate. Maryland, 488 F.Supp. at 356-57.

The instant case, however, presents a question not implicated in Maryland --the question whether, as Operation

Rescue contends, the Speech or Debate Clause not only defines but also limits the scope of immunity that members of Congress may receive for their statements and, therefore, prohibits a statutory expansion of that immunity. As indicated earlier, the Speech or Debate Clause does not constitute such a prohibition.

The Speech or Debate Clause does not expressly prohibit legislation expanding the scope of immunity it affords. It merely states that members of Congress cannot be questioned elsewhere for what they say in either House. U.S. Const. art. I, § 6, cl. 1. Nor does the Speech or Debate Clause implicitly manifest an intent to prohibit such legislation.

Rather, the architecture of Article I indicates that it would be improper to interpret the Speech or Debate Clause as a limitation on the power of Congress to act under the Necessary and Proper Clause. In rejecting the state of Maryland's narrow interpretation of the Necessary and Proper Clause in M'Culloch, Chief Justice Marshall noted that, "The clause is placed among the powers of Congress, not among the limitations on those powers." 17 U.S. at 419. As this observation reflects, when enacted in 1789, the Constitution included a series of express limitations on the power of Congress to legislate. See U.S. Const. art. I, § 9. These limitations range from prohibiting interference with the importation of slaves until 1808 to prohibiting the granting of any title of nobility. Id. These express prohibitions do not include any limitation on the power to expand by statute the immunity conferred by the Speech or Debate Clause.

The fact that the prohibition that Operation Rescue claims to exist is not expressly included in Article I, § 9 is illuminating, but not dispositive. As James Madison explained in The Federalist No. 44, the constitutional convention neither attempted a positive enumeration of all of the powers necessary

and proper to effectuate the authority explicitly granted to the federal government nor attempted to enumerate all of the particular powers not necessary and proper for executing the general powers delegated to the national government. See The Federalist No. 44, at 129. Rather, the Founders established a system which would, with some exceptions that came to include those later expressly included in the Bill of Rights, allow citizens, through their representatives, to decide based on experience gained as our nation evolved what laws were necessary and proper to sustain the vitality of the democratic government established by the Constitution--subject to judicial review to assure that power was not abused.

As described earlier, it is "long-settled," Chadha, 462 U.S. at 983, 103 S.Ct. at 2801, that judicial deference is due to Congress in deciding what measures are necessary and proper, and those decisions should not be invalidated unless they violate some specific constitutional check on that power, such as a provision of the Bill of Rights or one of the prohibitions of Article I, § 9. See Rotunda & Nowak, Treatise on Constitutional Law, § 3.3, at 309. As noted earlier, the plaintiff bears the burden of demonstrating that such a prohibition exists. Rogers, 123 F.3d at 37. Operation Rescue has failed to satisfy this burden. Thus, under established standards, its claim of unconstitutionality fails.

The court has considered, however, whether the usual deferential standard of review ought to be heightened where, as here, it may be argued that the legislation at issues serves the personal interests of those who have enacted it. No precedent for heightened scrutiny in such circumstances has been cited. In addition, there are significant reasons not to apply a heightened standard of review in this case.

It has been held that the official immunity created by the Speech or Debate clause does not exist "simply for the personal

or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." Brewster, 408 U.S. at 507, 92 S.Ct. at 2535.[18] This is also true of the extension of that immunity to

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18. For essentially the same reason, plaintiffs' claim that the Westfall Act as applied to members of Congress violates Article I, § 6, cl. 2 of the Constitution is without merit. That provision prohibits a Senator or Representative, during his current term, from being appointed to any civil office under the authority of the United States which was created during that term, or the "emoluments" of which were increased during that term.

This prohibition is rooted in "a fear that corruption would result if the legislature multiplied the number or increased the salaries of public offices for the benefit of its own members." Atkins v. United States, 214 Ct.Cl. 186, 556 F.2d 1028, 1070 (1977). See also Signorelli v.. Evans, 637 F.2d 853, 859-62 (2d Cir.1980). The Westfall Act, however, creates no new office. Nor does it increase the "emoluments" of a member of Congress' office because official immunity is not an "emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." Barr, 360 U.S. at 572, 79 S.Ct. at 1340.

Similarly, the Westfall Act does not violate the Twenty Seventh Amendment, which prohibits a Senator or Representative from receiving the benefit of legislation providing additional compensation for his or her service until after being reelected. U.S. Const. amend XXVII. The immunity conferred by the Westfall Act is not "compensation." As indicated above, official immunity does not exist "simply for the personal or private benefit of Members of Congress, but

statements by a Senator or Representative, concerning pending legislation, made outside of Congress because official immunity is generally "an expression of a policy designed to aid in the effective functioning of government." Barr v. Matteo, 360 U.S. 564, 572, 79 S.Ct. 1335, 1340, 3 L.Ed.2d 1434 (1959).

Moreover, members of Congress cannot usually expand their own immunity unilaterally. The enactment of legislation generally requires the concurrence of Congress and the President. U.S. Const. art. I, § 7, cl. 2 and 3 (prescribing that to be enacted, legislation must be passed by the House and the Senate and signed by the President, unless a Presidential veto is overridden by two-thirds of each House of Congress).

Nor can members of Congress expand their own immunity with any assurance of impunity. Congress and the President "stand accountable to the people for their action." Chastain, 833 F.2d at 327. They must face the voters, who are the ultimate source of their power to legislate and, indeed, to remain in office. The court recognizes that recently few incumbent members of Congress have been voted out of office. However, as Justice Benjamin Cardozo observed, "[t]he utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise." Benjamin N. Cardozo, The Nature of the Judicial Process 92 (Yale Univ. Press 1921). The longstanding and enduring reticence of members of Congress to vote themselves a pay raise despite the many years of inflation that have eroded the value of their salaries is but the most recent reminder that the

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to protect the integrity of the legislative process by insuring the independence of individual legislators." Brewster, 408 U.S. at 507, 92 S.Ct. at 2535.

power of a dissatisfied citizenry to replace their representatives continues to restrain legislative judgment concerning matters that directly affect members of Congress.

Our constitution establishes a government which derives its power from the people. Congress is generally authorized to enact legislation that it believes is appropriate to facilitate the performance of its duties. The Westfall Act, as applied to members of Congress, is such legislation. Courts may not properly invalidate legislation deemed necessary and proper by Congress unless it violates a specific prohibition--express or clearly implied--in the Constitution. The Speech or Debate Clause is not such a prohibition. Thus, the court must defer to the judgment of Congress. Members of Congress must stand accountable to the people for their action in extending their own immunity and, in view of the Westfall Act, for any defamatory statements they make in discharging their duties.

IV. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. Plaintiff's motions to REMAND are DENIED;
2. Defendant's motion to dismiss is ALLOWED; and
3. This case is DISMISSED.

[APPENDIX C]

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION Art. I, Section 1

Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. CONSTITUTION Art. I, Section 6, Clause 1

Compensation of Members

Privilege from Arrest

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. CONSTITUTION Art. I, Section 8

Enactment of Laws for Execution

of Governmental Powers

The Congress shall have Power To

* * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONSTITUTION Art. I, Section 6, Clause 2

Holding Other Offices

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been

created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

[APPENDIX D]

STATUTES AND PUBLIC LAWS

TITLE 1 U.S.C. § 1

Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise--

* * * *

"officer" includes any person authorized by law to perform the duties of the office;

* * * *

TITLE 2 U.S.C. § 60-1

Authority of officers of Congress over Congressional employees

(a) Qualifications determinations; removal and discipline

Each officer of the Congress having responsibility for the supervisio of employees, including employees appointed upon recommendation of Members of Congress, shall have authority--

(1) to determine, before the appointment of any individual as an employee under the supervision of that officer of the Congress, whether that individual possesses the qualifications necessary for the satisfactory performance of the duties and responsibilities to be assigned to him; and

(2) to remove or otherwise discipline any employee under his supervision.

(b) "Officer of the Congress" defined

As used in this section, the term "officer of the Congress" means–

(1) an elected officer of the Senate or House of Representatives who is not a Member of the Senate or House; and

(2) The Architect of the Capitol.

TITLE 5 U.S.C. § 2104

Officer

(a) For the purpose of this title, "officer", except as otherwise provided by this section or when specifically modified, means a justice or judge of the United States and an individual who is--

(1) required by law to be appointed in the civil service by one of the following acting in an official capacity--

(A) the President;

(B) a court of the United States;

(C) the head of an Executive agency; or

(D) the Secretary of a military department;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.

(b) Except as otherwise provided by law, an officer of the United States Postal Service or of the Postal Rate Commission is deemed not an officer for purposes of this title.

TITLE 5 U.S.C. § 2105

Employee

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--

(1) appointed in the civil service by one of the following acting in an official capacity--

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

* * * *

TITLE 5 U.S.C. § 2106

Member of Congress

For the purpose of this title, "Member of Congress" means the Vice President, a member of the Senate or the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico.

TITLE 5 U.S.C. § 2107

Congressional employee

For the purpose of this title, "Congressional employee" means--

(1) an employee of either House of Congress, of a committee of either House, or of a joint committee of the two Houses;

(2) an elected officer of either House who is not a Member of Congress;

(3) the Legislative Counsel of either House and an employee of his office;

(4) a member of the Capitol Police;

(5) an employee of a Member of Congress if the pay of the employee is paid by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives;

[(6) Repealed. Pub.L. 90-83, S 1(5)(A), Sept. 11, 1967, 81 Stat. 196.]

(7) the Architect of the Capitol and an employee of the Architect of the Capitol;

(8) an employee of the Botanic Garden; and

(9) an employee of the Capitol Guide Service.

TITLE 28 U.S.C. § 1346

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil

actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

TITLE 28 U.S.C. § 1442

Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

TITLE 28 U.S.C. § 2671

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military

departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

TITLE 28 U.S.C. 2679

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or

relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office

or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

TITLE 28 U.S.C. § 2680

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of

process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

* * * *

PUBLIC LAW 100-694
November 18, 1988
102 Stat 4563

An Act to amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employees Liability Reform and Tort Compensation Act of 1988".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. -- The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) PURPOSE. -- It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while

providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

SEC. 3. JUDICIAL AND LEGISLATIVE BRANCH EMPLOYEES.

Section 2671 of title 28, United States Code, is amended in the first full paragraph by inserting after "executive departments," the following: "the judicial and legislative branches,".

SEC. 4. RETENTION OF DEFENSES.

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

"With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.".

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act

or omission occurred.

"(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government --

"(A) which is brought for a violation of the Constitution of the United States, or

"(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of

removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

"(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if --

"(A) the claim would have been timely had it been filed on

the date the underlying civil action was commenced, and

"(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

* * * *

Approved November 18, 1988.

[APPENDIX E]
TABLE A
Selected Federal Statutes[1]

Title 2 U.S.C. § 31-2, **Gifts and travel** ..... App. 76a
[Express statement, Contra-distinction: "Member, officer, or employee of the Senate"]
Title 2 U.S.C. § 60-1, **Authority of officers of Congress over Congressional employees** ..... App. 78a
[Contra-distinction: "Members of Congress", "officer of the Congress", "Congressional employees"]
Title 2 U.S.C. § 288c, **Defending the Senate, a committee, subcommittee, member, officer, or employee of the Senate**[2] ..... App. 79a
[Express statement, Contra-distinction: "Member, officer, or employee of the Senate"]
Title 5 U.S.C. § 7211, **Employees' right to petition Congress** ..... App. 80a
[Contra-distinction: "Member" and "employees"]
Title 5 U.S.C. § 7342, **Receipt and disposition of foreign gifts and decorations** (partial) ..... App. 80a
[Express statement: Members are encompassed within this statute explicitly]
Title 5 U.S.C. § 7353, **Gifts to Federal employees** App. 81a
[Express statement, Contra-distinction: "Member of Congress or officer or employee of the executive, legislative, or judicial branch"]

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1. Emphases have been added to the statutes in Tables A, B, and C.

2. Titles also indicate distinctiveness. *West Virginia Univ. Hospitals v. Casey*, 499 U.S. 83, 91 (1991).

Title 18 U.S.C. § 207(e) & (i), **(e) Restrictions on members of Congress and officers and employees of the legislative branch; (i) Definitions**

18 U.S.C. § 207(e) ..... App. 83a

18 U.S.C. § 207(i) ..... App. 86a

[Express statement, Contra-distinction: Beginning with subsection 207(e)'s title, "Restrictions on Members of Congress **and** officers **and** employees of the legislative branch", contra-distinctions between Members of Congress *and* officers *and* employees throughout]

Title 28 U.S.C. § 2671, **Definitions** (respecting the FTCA as amended by the Westfall Act) ..... App. 86a

["officers or employees" of the "legislative branch[]"]

Title 2 U.S.C. § 31-2
Gifts and travel

(a) Gifts

(1) No *Member, officer, or employee* of the Senate, or the spouse or dependent thereof, shall knowingly accept, directly or indirectly, any gift or gifts in any calendar year aggregating more than the minimal value as established by section 7342(a)(5) of Title 5 or $250, whichever is greater[] from any person, organization, or corporation unless, in an unusual case, a waiver is granted by the Select Committee on Ethics.

* * * *

(3) For purposes of this subsection--

(A) the term "gift" means a payment, subscription, advance, forbearance, rendering, or deposit of money, services, or anything of value, including food, lodging, transportation, or entertainment, and reimbursement for other than necessary expenses, * * * * but does not include * * * * (5) a reception at

which the *Member, officer, or employee* is to be honored, provided such individual receives no other gifts that exceed the restrictions in this rule, other than a suitable memento * * * *

(4) If a *Member, officer, or employee,* after exercising reasonable diligence to obtain the information necessary to comply with this rule, unknowingly accepts a gift described in paragraph (1) such *Member, officer, or employee* shall, upon learning of the nature of the gift and its source, return the gift or, if it is not possible to return the gift, reimburse the donor for the value of the gift.

(5)(A) Notwithstanding the provisions of this subsection, a *Member, officer, or employee* of the Senate may participate in a program, the principal objective of which is educational, sponsored by a foreign government or a foreign educational or charitable organization involving travel to a foreign country paid for by that foreign government or organization if such participation is not in violation of any law and if the select[] Committee on Ethics has determined that participation in such program by *Members, officers, or employees* of the Senate is in the interests of the Senate and the United States.

(B) Any *Member* who accepts an invitation to participate in any such program shall notify the Select Committee in writing of his acceptance. A *Member* shall also notify the Select Committee in writing whenever he has permitted any *officer or employee* whom he supervises to participate in any such program. The chairman of the Select Committee shall place in the Congressional Record a list of all individuals,[] participating, the supervisors of such individuals where applicable;[] and the nature and itinerary of such program.

(C) No *Member, officer, or employee* may accept funds in connection with participation in a program permitted under subparagraph (A) if such funds are not used for necessary food, lodging, transportation, and related expenses of the *Member,*

officer, or employee.

(b) Limits on domestic and foreign travel by Members and staff of Senate

The term "necessary expenses", with respect to limits on domestic and foreign travel by Members and staff of the Senate, means reasonable expenses for food, lodging, or transportation which are incurred by a *Member, officer, or employee* of the Senate in connection with services provided to (or participation in an event sponsored by) the organization which provides reimbursement for such expenses or which provides the food, lodging, or transportation directly. Necessary expenses do not include the provision of food, lodging, or transportation, or the payment for such expenses, for a continuous period in excess of 3 days exclusive of travel time within the United States or 7 days exclusive of travel time outside of the United States unless such travel is approved by the Committee on Ethics as necessary for participation in a conference, seminar, meeting or similar matter. Necessary expenses do not include the provision of food, lodging, or transportation, or the payment for such expenses, for anyone accompanying a *Member, officer, or employee* of the Senate, other than the spouse or child of such *Member, officer, or employee* of the Senate or one Senate employee acting as an aide to a Member.

TITLE 2 U.S.C. § 60-1
Authority of *officers of Congress* over *Congressional employees*

(a) Qualifications determinations; removal and discipline

Each *officer* of the Congress having responsibility for the supervision of *employees*, including *employees* appointed upon recommendation of *Members of Congress*, shall have

authority--

(1) to determine, before the appointment of any individual as an *employee* under the supervision of that *officer* of the Congress, whether that individual possesses the qualifications necessary for the satisfactory performance of the duties and responsibilities to be assigned to him; and

(2) to remove or otherwise discipline any *employee* under his supervision.

(b) "Officer of the Congress" defined

As used in this section, the term "officer of the Congress" means–

(1) an elected officer of the Senate or House of Representatives who is not a Member of the Senate or House; and

(2) The Architect of the Capitol.

TITLE 2 U.S.C. § 288c
Defending the Senate, committee, subcommittee, member, officer, or employee of Senate

(a) Except as otherwise provided in subsection (b) of this section, when directed to do so pursuant to section 288b(a) of this title, the Counsel shall--

(1) defend the Senate, a committee, subcommittee, *Member, officer, or employee* of the Senate in any civil action pending in any court of the United States or of a State or political subdivision thereof, in which the Senate, such committee, subcommittee, *Member, officer, or employee* is made a party defendant and in which there is placed in issue the validity of any proceeding of, or action, including issuance of any subpena or order, taken by the Senate, or such committee, subcommittee, *Member, officer, or employee* in its or his official or representative capacity; or

(2) defend the Senate or a committee, subcommittee, *Member, officer, or employee* of the Senate in any proceeding with respect to any subpena or order directed to the Senate or such committee, subcommittee, *Member, officer, or employee* in its or his official or representative capacity.

(b) Representation of a *Member, officer, or employee* under subsection (a) of this section shall be undertaken by the Counsel only upon the consent of such *Member, officer, or employee.*

5 U.S.C. § 7211
Employees' right to petition Congress

The right of *employees*, individually or collectively, to petition Congress or a *Member of Congress*, or to furnish information to either House of Congress, or to a committee or *Member* thereof, may not be interfered with or denied.

5 U.S.C.A. § 7342
Receipt and disposition of
foreign gifts and decorations

(a) For the purpose of this section--

(1) "employee" means--

* * * *

(F) a Member of Congress as defined by section 2106 of this title (except the Vice President) and any Delegate to the Congress; and

* * * *

(6) "employing agency" means--

(A) the Committee on Standards of Official Conduct of the House of Representatives, for *Members and employees of the House of Representatives*, except that those responsibilities

specified in subsections (c)(2)(A), (e)(1), and (g)(2)(B) shall be carried out by the Clerk of the House;

(B) the Select Committee on Ethics of the Senate, for *Senators and employees of the Senate*, except that those responsibilities (other than responsibilities involving approval of the employing agency) specified in subsections (c)(2), (d), and (g)(2)(B) shall be carried out by the Secretary of the Senate;

(C) the Administrative Office of the United States Courts, for judges and judicial branch employees; and

(D) the department, agency, office, or other entity in which an employee is employed, *for other legislative branch employees* and for all executive branch employees.

* * * *

(e)* * * *(2) Gifts and decorations received by a *Senator or an employee of the Senate* that are deposited with the Secretary of the Senate for disposal, or are deposited for an official use which has terminated, shall be disposed of by the Commission on Arts and Antiquities of the United States Senate.

* * * *

TITLE 5 U.S.C. § 7353
Gifts to Federal employees

(a) Except as permitted by subsection (b), no *Member of Congress or officer or employee* of the executive, *legislative*, or judicial *branch* shall solicit or accept anything of value from a person--

(1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity; or

(2) whose interests may be substantially affected by the

performance or nonperformance of the individual's official duties.

(b)* * * *(2)(A) Subject to subparagraph (B), a *Member, officer, or employee* may accept a gift pursuant to rules or regulations established by such individual's supervising ethics office pursuant to paragraph (1). * * * *

(3) Nothing in this section precludes a *Member, officer, or employee* from accepting gifts on behalf of the United States Government or any of its agencies in accordance with statutory authority.

(c) A *Member of Congress or an officer or employee* who violates this section shall be subject to appropriate disciplinary and other remedial action in accordance with any applicable laws, Executive orders, and rules or regulations.

(d) For purposes of this section--

(1) the term "supervising ethics office" means--

(A) the Committee on Standards of Official Conduct of the House of Representatives or the House of Representatives as a whole, *for Members, officers, and employees of the House of Representatives*;

(B) the Select Committee on Ethics of the Senate, or the Senate as a whole, for *Senators, officers, and employees of the Senate*;

* * * *

(E) in the case of legislative branch officers and employees other than those specified in subparagraphs (A) and (B), the committee referred to in either such subparagraph to which reports filed by such officers and employees under title I of the Ethics in Government Act of 1978 are transmitted under such title, except that the authority of this section may be delegated by such committee with respect to such officers and employees; and

(2) the term "officer or employee" means an individual

holding an appointive or elective position in the executive, legislative, or judicial branch of Government, other than a Member of Congress.

TITLE 18 U.S.C. § 207
Restrictions on former officers, employees, and elected officials of the executive and legislative branches

* * * *

(e) Restrictions on Members of Congress and officers and employees of the legislative branch.--

(1) *Members of Congress and elected officers*.--(A) Any person who is a Member of Congress or an elected officer of either House of Congress and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B) or (C), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a *Member, officer, or employee* of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former Member of Congress are any *Member, officer, or employee* of either House of Congress, and any employee of any other legislative office of the Congress.

(C) The persons referred to in subparagraph (A) with respect to appearances or communications by a former elected officer are any *Member, officer, or employee* of the House of Congress in which the elected officer served.

(2) *Personal staff*.--(A) Any person who is an employee of a Senator or an employee of a Member of the House of

Representatives and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a *Member, officer, or employee* of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a person who is a former employee are the following:

(i) the Senator or Member of the House of Representatives for whom that person was an employee; and

(ii) any employee of that Senator or Member of the House of Representatives.

(3) *Committee staff.*--Any person who is an employee of a committee of Congress and who, within 1 year after the termination of that person's employment on such committee, knowingly makes, with the intent to influence, any communication to or appearance before any person who is a *Member or an employee* of that committee or who was a Member of the committee in the year immediately prior to the termination of such person's employment by the committee, on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a *Member, officer, or employee* of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(4) Leadership staff.--(A) Any person who is an employee on the leadership staff of the House of Representatives or an employee on the leadership staff of the Senate and who, within 1 year after the termination of that person's employment on

such staff, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a *Member, officer or employee* of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the following:

(i) in the case of a former employee on the leadership staff of the House of Representatives, those persons are *any Member* of the leadership of the House of Representatives *and any employee* on the leadership staff of the House of Representatives; and

(ii) in the case of a former employee on the leadership staff of the Senate, those persons are *any Member* of the leadership of the Senate *and any employee* on the leadership staff of the Senate.

(5) *Other legislative offices*.--(A) Any person who is an employee of any other legislative office of the Congress and who, within 1 year after the termination of that persons's employment in such office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by any officer or employee of such office, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former

employee are the employees and officers of the former legislative office of the Congress of the former employee.

* * * *

(7) Definitions.--As used in this subsection--

* * * *

(C) the term "*employee of the House of Representatives*" means *an employee of a Member* of the House of Representatives, an employee of a committee of the House of Representatives, an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, and an employee on the leadership staff of the House of Representatives;

(D) the term "*employee of the Senate*" means *an employee of a Senator*, an employee of a committee of the Senate, an employee of a joint committee of the Congress whose pay is disbursed by the Secretary of the Senate, and an employee on the leadership staff of the Senate;

* * * *

(i) Definitions.--For purposes of this section--

(1) the term "*officer or employee*", when used to describe the person to whom a communication is made or before whom an appearance is made, with the intent to influence, shall include--

(A) in subsections (a), (c), and (d), the President and the Vice President; and

(B) in subsection (f), the President, the Vice President, and *Members of Congress*;

* * * *

TITLE 28 U.S.C. § 2671
Definitions

As used in this chapter and sections 1346(b) and 2401(b) of

this title, the term "Federal agency" includes the executive departments, the judicial and *legislative branches*, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes *officers or employees* of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

NOTE TO TABLE A:

THE LEGISLATIVE PAY ACT OF 1929: *contra-distinction of Members of Congress with legislative officers and employees.* With its Legislative Pay Act of 1929, Pub. L. No. 71-17, 46 Stat. 32, Congress created the officers and employees of the legislative branch for the then-pertinent fiscal year. This statute has in turn become the platform on which Congress has routinely supplemented its roster of legislative officers and employees. As an example,

> "Whenever any *office* [**legislative *officers***] or position [**legislative employees**] not specifically established by the Legislative Pay Act of 1929 is appropriated for herein or whenever the rate of compensation or designation of any position appropriated for herein is different from that

> specifically established for such position by such Act, the rate of compensation and the designation of the position, or either, appropriated for or provided herein, shall be the permanent law with respect thereto. *Provided*, That the provisions herein for the various items of official expenses of *Members*, *officers*, and committees *of the Senate and House*, and clerk hire *for Senators and Members* shall be permanent law with respect thereto."

Legislative Branch Appropriations Act, 1989, Pub. L. No. 100-458, § 303, 102 Stat. 2158, 2181 (emphasis added) (enacted Oct. 1, 1988, 48 days before the Westfall Act).

Congress has consistently followed this historical pattern. *See, e.g.*, Legislative Branch Appropriations Act, 1959, Pub. L. No. 85-570, § 103, 72 Stat. 439, 453 (similar text); Legislative Branch Appropriations Act, 1969, Pub. L. No. 90-417, § 103, 82 Stat. 398, 412 (similar text); Legislative Branch Appropriations Act, 1990, Pub. L. No. 101-163, § 303, 103 Stat. 1041, 1063 (identical text); Legislative Branch Appropriations Act, 1992, Pub. L. No. 102-90, § 303, 105 Stat. 447, 465-466 (identical text).

TABLE B

Selected Federal Statutes Expressly Providing That Members of Congress May Be Treated as Federal Employees

SELECTED EMPLOYMENT-RELATED FEDERAL STATUTES, in which Congress has expressly legislated that its Members may be treated as federal "employees", overriding the initial premise, based on Congress' historical practice, which mandates that Members are neither "officers" nor "employees" unless expressly stated otherwise	
Federal Statute	**Illustrative Excerpt**
Title 5 U.S.C. § 8311, entitling Members to Federal Employee Retirement Benefits	"For the purpose of this subchapter [subchapter II (entitled 'Forfeiture of Annuities and Retired Pay'), chapter 83 (entitled "Retirement"), 5 U.S.C. §§ 8311 et seq.] - (1) "employee" means - * * * * (B) a Member of Congress as defined by section 2106 of this title and a Delegate to Congress;"

Federal Statute	Illustrative Excerpt
Title 5 U.S.C. § 8331, entitling Members to Federal Employee Civil Service Retirement Benefits	"For the purpose of this subchapter [subchapter III (entitled "Civil Service Retirement"), chapter 83 (entitled "Retirement"), 5 U.S.C. §§ 8331 et seq.] - * * * * (2) "Member" means a Member of Congress as defined by section 2106 of this title, after he gives notice in writing to the official by whom he is paid of his desire to become subject to this subchapter, but does not include any such Member of Congress who is subject to the Federal Employees' Retirement System or who makes an election under section 8401(20) of this title not to be subject to such System; * * * * [see further express inclusion of "Member" in subsections (3), (4), (8), (9), (10), (14), (19), (23)] [See I.R.C. § 7701(j) for other employment benefits related to §§ 8331 et seq.]"

App. 91a--Table B

Federal Statute	Illustrative Excerpt
Title 5 U.S.C. § 8401, entitling Members to the Federal Employees' Retirement System	"For the purpose of this chapter* * * * (2) the term 'annuitant' means a former employee or [a former] Member who, on the basis of that individual's service, meets all requirements for title to an annuity under subchapter II or V of this chapter and files claim therefor; (3) the term 'average pay' means the largest annual rate resulting from averaging an employee's or Member's rates of basic pay * * * * (19) the term "lump-sum credit" means the unrefunded amount consisting of - (A) retirement deductions made from the basic pay of an employee or Member under section 8422(a) of this title (or under section 204 of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983; (B) amounts deposited by an employee or Member under section 8422(e); (C) amounts deposited by an employee, Member, or survivor under section 8411(f); * * * * (20) the term 'Member' has the same meaning as provided in section 2106, except that such term does not include [a Member who opts out of the Federal Employees' Retirement System]; * * * * (27) [see further express inclusion of 'Member'];"

Federal Statute	Illustrative Excerpt
Title 5 U.S.C. § 8701, entitling Members to Federal Employee Life Insurance Benefits	"(a) For the purpose of this chapter [chapter 87 (entitled "Life Insurance"), 5 U.S.C. §§ 8701 et seq.], "employee" means - * * * * (2) a Member of Congress as defined by section 2106 of this title;"
Title 5 U.S.C. § 8901, entitling Members to Federal Employee Health Insurance Benefits	"For the purpose of this chapter [chapter 89 (entitled "Health Insurance"), 5 U.S.C. §§ 8901 et seq.] - (1) "employee" means - * * * * (B) a Member of Congress as defined by section 2106 of this title;"
Title 26 U.S.C. § 3401(c), entitling Members to take advantage of Federal Income Tax Withholding, I.R.C. [26 U.S.C.] § 3401(c)	"For purposes of this chapter [chapter 24 (entitled "Collection of Income Tax at Source"), 26 U.S.C. §§ 3401 et seq.], the term 'employee' includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing."

Federal Statute	Illustrative Excerpt
State Income Taxation via Public Salary Tax Act of 1939, Pub. L. No. 76-32, §§ 4, 210, 53 Stat. 574, 575, 577, including Members within the reach of Respective State Income Taxation, including state income tax withholding	"The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States * * * * by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation." "For the purposes of this Act, the term 'officer or employee' includes a member of a legislative body and a judge or officer of a court."

TABLE C

Federal Statutes Evidencing Congress' Historical, Statutory Usage Distinguishing "Members", "Officers", and "Employees" Each As A Separate Category Of Personnel

Federal Statute or Provision	**Illustrative Excerpts**
Senate Manual, [*available in* www.senate.gov\~rule\srules\htm] **Rules of the House of Representatives,** [*available in* http://clerkweb.house.gov\docs\rules\105\]	Contra-distinctions, *passim*. [These documents contain the internal working rules of each respective House of Congress. The use of these formal documents began when Congress first convened in 1789.] As an example, Senate Rule XXIII, Privilege of the Floor, "*Other than* the Vice President and *Senators*, no person shall be admitted to the floor of the Senate while in session, except as follows: ... *The officers and employees of the Senate* in discharge of their official duties." (Emphasis added) A search of the referenced Senate and House databases will demonstrate just *how extensive* Congress' statutory usage of "Members, officers, employees" as contrasted with "officers, employees" continues to this day

Federal Statute or Provision	Illustrative Excerpts
Title 2, U.S.C., entitled "The Congress", **"Compensation and Allowances of Members",** Chapter 3, §§ 31 to 59h **"Officers and Employees of Senate and House of Representatives",** Chapter 4, §§ 60-1 to 130e	Contra-distinctions, *passim* Congress explicitly states, time after time, that there are three distinct categories of personnel, Members, officers of the legislative branch, employees of the legislative branch

Federal Statute or Provision	Illustrative Excerpts
Act of June 1, 1789, Ch. 1, § 1, 1 Stat. 23-24 (lst Cong.) ("An Act to regulate the Time and Manner of administering certain oaths") (emphasis added)	Contra-distinctions, *passim* **Sec. 1** set forth the procedure to be followed *by the Members* of the then sitting Congress respecting the constitutional oath. The oath itself was set forth. **Sec. 2** set forth the procedures to be followed *by the Members* of each succeeding Congress. "**Sec. 4** And be it further enacted, *That all officers* appointed, or hereafter to be appointed under the authority of the United States, shall, before they act in their respective officers, take the [foregoing] oath or affirmation..."

Federal Statute or Provision	Illustrative Excerpts
Act of Sept. 22, 1789, Ch. 17, 1 Stat. 70-72 (1st Cong.) ("An Act for allowing Compensation *to the Members* of the Senate and House of Representatives of the United States, *and to the officers of both houses*") (emphasis added)	Contra-distinctions, *passim*. § 6, "That the said compensation, which shall be due *to the members and officers* of the Senate, shall be certified by the President [of the Senate]; and that which shall be due *to the members and officers* of the House of Representatives, shall be certified by the Speaker;"
Act of Dec. 23, 1791, Ch. 3, § 1, 1 Stat. 226. (2nd Cong.) ("An Act making Appropriations for the Support of Government for the year [1792]" (emphasis added)	Contra-distinctions: "For the like compensations *to the members* of the Senate and House of Representatives, *and other officers and attendants of the two Houses*, estimated on a session of six moths continuance, and including the traveling expenses *of the members*, [$129,730]."

App. 98a--Table C

Federal Statute or Provision	Illustrative Excerpts
Act of March 14, 1794, Ch. 6, 1 Stat. 342 (3rd Cong.) ("An Act making Appropriations for the support of the Government, for the year [1794]") (emphasis added)	Contra-distinctions: "For the like compensations *to the members* of the Senate and House of Representatives, *their officers and attendants*, estimated for a session of six months continuance, [$185,890]:"
Act of Feb. 5, 1796, Ch. 1, § 1,1 Stat. 445 (4th Cong.) ("An Act making Appropriations for the Support of Government, for the year [1796]") (emphasis added)	Contra-distinctions, "For the like compensations *to the members* of the Senate and House of Representatives, their *officers and attendants*, estimated for a session of six months continuance, [$193,460]"

Federal Statute or Provision	Illustrative Excerpts
Act of March 10, 1796, Ch. 4, 1 Stat. 448-449 (4th Cong.) ("An Act for allowing compensation *to the members* of the Senate and House of Representatives of the United States, *and to certain officers of both Houses*") (emphasis added)	Contra-distinctions, *passim* § 5, "That the said compensation, which shall be due *to the members and officers* of the Senate, shall be certified by the President [of the Senate]: and that which shall be due *to the members and officers* of the House of Representatives, shall be certified by the Speaker;"
Act of Feb. 10. 1808, Ch. 17, 2 Stat. 464 (10th Cong.) ("An Act making appropriations for the support of the Government during the year [1808])" (emphasis added)	Contra-distinctions, *passim*, "For compensation granted by law *to the members* of the Senate and House of Representatives, *their officers and attendants*, estimated for a session of four months and a half continuance, [$201,425]"
Act of April 21, 1808, Ch. 48, 2 Stat. 484-485 (10th Cong.) ("An Act concerning public contracts")	Contra-distinctions, *passim*

Federal Statute or Provision	Illustrative Excerpts
Act of Feb. 26, 1853, Ch. 81, 10 Stat. 170 (32d Cong.) ("An Act to prevent Frauds upon the Treasury of the United States") (emphasis added)	Contra-distinctions: **Sec. 2** applied to "*any officer of the United States, or person holding any place of trust or profit, or discharging any official functions* under, or in connection with, any executive department.. Or under the Senate or House of Representatives of the United States, ..." **Sec. 3** applied to "*any Senator or Representative in Congress*", respecting a crime functionally equivalent to the activity described in § 2 **Sec. 6** applied to "*to any member of the Senate or House of Representatives* ... or *to any officer of the United States* ... under... any department of the Government of the United States, *or under the Senate or House of Representatives of the United States*"

App. 101a--Table C

Federal Statute or Provision	Illustrative Excerpts
Act of March 3, 1857, ch. 107, 11 Stat. 206, 206-207 (34th Cong.) ("An Act making Appropriations for the Legislative, Executive, and Judicial Expenses of the Government for the Year ending the thirtieth of June, [1858]") (emphasis added)	Contra-distinctions: "For compensation and mileage of *senators*, [$333,250]. For compensation *of the officers, clerks, messengers, and others*, receiving an annual salary *in the service of the Senate*, viz: [here follows a detailed list of such officer & employee positions, with a separately appropriated total]. ... For compensation and mileage *of members of the House of Representatives*, ...[$1,248,750]. For compensation *of the officers, clerks, messengers and others* receiving an annual salary *in the service of the House of Representatives*, viz: [here follows a detailed list of such officer & employee positions, with a separately appropriated total]"

Federal Statute or Provision	**Illustrative Excerpts**
Act of Jan. 16, 1883, Ch. 27, 22 Stat. 403, 406-407 (47th Cong.) ("An act to regulate and improve the civil service of the United States") (emphasis added)	Contra-distinctions, express statement, **Sec. 11**, "*[N]o Senator, or Representative, ... or any officer or employee of either of said houses*, and no executive, judicial, military, or naval officer of the United States, and *no clerk or employee of any* department, *branch* ...[shall solicit political contributions] *from any officer, clerk, or employee of the United States, or any* department, Branch, or bureau thereof, ... **Sec. 14**, "*[N]o officer, clerk, or other person in the service of the United States* shall [give any political contribution *to*] *any Senator or Member* of the House of Representatives..."

Federal Statute or Provision	Illustrative Excerpts
Act of March 2, 1895, Ch. 177, 28 Stat. 764 (53rd Cong.) (An Act Making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, [1896], and for other purposes") (emphasis added)	Contra-distinctions, **SENATE**, 28 Stat. 764-767: "For compensation *of Senators*, [$440,000]. ... For compensation *of the officers, clerks, messengers, and others* in the service of the Senator, [$432,228.90], namely: [here follows a detailed list of officer and employee positions]" **HOUSE**, 28 Stat. 767-771: "For compensation *of Members* of the House of Representatives [and Delegates], [$1,803,000]. ...For compensation *of the officers, clerks, messengers, and others* in the service of the House of Representatives, [$393,566.88], namely: [here follows a detailed list of officer and employee positions]." 28 State. 764, 771 (now codified as 2 U.S.C. § 101): "Hereafter *no employee of Congress*, either in the Senate or House, shall sublet to, or hire, another to do or perform any part of the duties or work attached to the position to which he was appointed."

Federal Statute or Provision	Illustrative Excerpts
Act of March 4, 1909, Ch. 321, Pub. L. No. 60-350, 35 Stat. 1088, 1110 ("An Act to Codify, revise, and amend the penal laws of the United States")	**Sections 118, 121** read largely the same as §§ 11, 14 of the Act of Jan. 16, 1883
Act of May 24, 1924, Ch. 183, Pub. L. No. 68-136, 43 Stat. 146 ("An Act To fix the compensation *of officers and employees of the Legislative Branch* of the Government") (emphasis added)	The terms "Members" and "Senators" are used in obvious *contra-distinction* to the legislative branch officers and employees created under this statute
Legislative Pay Act of 1929, Ch. 33, Pub. L. No. 71-17, 46 Stat. 32 ("An Act To fix the compensation *of officers and employees of the Legislative Branch* of the Government") (emphasis added)	*See* comment respecting Act of May 24, 1924 (above)

Federal Statute or Provision	**Illustrative Excerpts**
Post-1929 **Legislative Branch Appropriations Acts**	Each annual, *post*-1929 legislative branch appropriations statute has typically referenced the Legislative Pay Act of 1929
Public Salary Tax Act of 1939, Ch. 59, Pub. L. No. 76-32,§ 210, 53 Sta. 574, 577 ("Relating to the taxation of the compensation *of public officers and employees*") (emphasis added)	Express statement, "For the purposes of this Act, the term 'officer or employee' includes *a member of a legislative body* and a judge and officer of a court."

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Federal Statute or Provision	Illustrative Excerpts
Legislative Reorganization Act of 1946, Ch. 753, Pub. L. No. 79-601, 60 Stat. 812 Title II - Miscellaneous, 60 Stat. 812, 834, Part I - Statutory provisions relating to congressional personnel; Title VI - Compensation and Retirement Pay of Members of Congress, 60 Stat. 812, 850	Contra-distinctions, *passim* (Title IV, 60 Stat. 812, 842, was the original enactment of the Federal Tort Claims Act)

Federal Statute or Provision	**Illustrative Excerpts**
Act of June 25, 1948, Ch. 654, Pub. L. N. 80-772, § § 201 *et seq.*, 62 Stat. 683, 694 (emphasis added)	Contra-distinctions, *passim*, §§ 201 *et seq.* (initially, § 201(a) did not apply to Members) Partial text of § of 216, 62 Stat. 683, 694, entitled, "Procurement of contract by officer of Member of Congress", "Whoever, being a *Member of .. Congress*, ... Or being *an officer, employee, or agent of the United States*,... takes, receives, or agrees to receive [money or other consideration in order to secure for another a contract] from the United States or from *any officer*, department or agency *thereof*; ..."

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Federal Statute or Provision	Illustrative Excerpts
Act of June 25, 1948, Ch. 645, Pub. L. N. 80-772, § § 431, 432, 62 Stat. 683, 702 Section 431 was entitled, "Contracts *by Member of Congress*" Section 432 was entitled, "*Officer or employee* contracting with *Member of Congress*" (emphasis added)	Contra-distinctions: one section applies to Members; the other, to officers and employees. §§ 431, 432 trace their roots to §§ 3739-3742, Revised Statutes, which in turn trace their roots to the Act of April 21, 1808, "An Act concerning public contracts", 2 Stat. 484 (contra-distinctions, passim) § 431, 62 Stat. 683, 702 (codified as 18 U.S.C. § 432), "Whoever, *being an officer or employee* of the United States, on behalf of the United States or any agency thereof, ... makes ... any contract, ...with any *Member of* ... *Congress*, ... shall be fined ..."
Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119 Section 201 was entitled "Bribery of public officials and witness" (emphasis added)	Contra-distinction, express statement: § 201(a), "'public official' means *Member of Congress, ... or an officer or employee or person acting for or on behalf of the United States*, or any department, agency, *or branch* of Government thereof,"

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Federal Statute or Provision	**Illustrative Excerpts**
Act of Oct. 23, 1962, Pub.L.No. 87-849, 76 Stat. 1119 Section 203 was entitled "Compensation *to Members of Congress, officers and others* in matters affecting the Government" Section 205 was entitled "Activities *of officers and employees* in claims against and other matters affecting the Government" (emphasis added)	*See, e.g.*, revised 18 U.S.C. § 203(a), 76 Stat. 1119, 1121. § 203(a)(1)(A) pertains *to "Member[s]"* while §203(a)(1)(B) pertains *to "officer[s] or employee[s] ... in the* executive, *legislative*, or judicial *branch* of the Government". *See also* Memorandum of Attorney General (Jan. 28, 1963), reported in notes following 18 U.S.C. §201, at pp. 283-293 (Lawyers' Coop. Publ. 1993). "1. Section 203 applies to Members of Congress as well as officers and employees of the Government; section 205 applies only to the latter." *Id.* at 288; *see also* 289 n.6.

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Federal Statute or Provision	Illustrative Excerpts
Government Employees Salary Reform Act of 1964, Pub. L. No. 88-426, 78 Stat. 400 Title II - **Federal Legislative Salary Act of 1964**, 78 Stat. 400, 413	Contra-distinctions, *passim e.g.*, §§202(a), (b), 204, 205
Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 Title VII - Senate Legal Counsel (creation of this function in the United States Senate), 92 Stat. 1824, 1875 (emphasis added)	Contra-distinctions, *passim, e.g.*, §§ 101, 103(a), (b), 701 *et seq*. Partial text of §§ 703(a), 701(f), 92 Stat. 1824, 1876-1877 (now codified as 2 U.S.C. §§ 288b(a), 288(f), respectively): "Section. 703. (a) The counsel shall defend the Senate or a committee, subcommittee, *Member, officer, or employee of the Senate* [as directed]." "[Sec. 701.] (f) The counsel and other employees of the Office shall maintain the attorney-client relationship with respect to all communications between them and *any Member, officer, or employee of the Senate*."

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Federal Statute or Provision	Illustrative Excerpts
Ethics Reform Act of 1989, Pub.L.No. 101-194, 103 Stat. 1716 (emphasis added)	Contra-distinctions, *passim, e.g.*, §§101, 303, 501, 801 *et seq.*, 901 *et seq.*, 1001 Partial text of §1001, 103 Stat. 1716, 1781, "The provisions of this Act that are applicable *to Members, officers, or employees of the legislative branch* are enacted by the Congress - [pursuant to lawful authority]."
Legislative Branch Appropriations Act, 1992, Pub.L.No. 102-90, 105 Stat. 447 (emphasis added)	Contra-distinctions, *passim*, Partial text of §314(f), 105 Stat. 447, 470 (amending the Ethics in Government Act of 1978 ["EGA-78"]): "The provisions of this Act [the EGA-78] that are applicable *to Members, officers, or employees of the legislative branch* are enacted by the Congress - [pursuant to lawful authority]."

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Federal Statute or Provision	Illustrative Excerpts
Civil Rights Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 Title III - **Government Employees Rights Act of 1991**, 105 Stat. 1071, 1088 (emphasis added)	Contra-distinctions, *passim, e.g.*, §§301, 307(b), 309, 312, 316, 319 Text of §312 (Prohibition of Intimidation), 105 Stat. 1071, 1094: "Any intimidation of, or reprisal against, any employee *by any Member, officer, or employee of the Senate*, or [by listed others], because of the exercise of a right under this title constitutes an unlawful employment practice...."
Congressional Accountability Act of 1995, Pub.L.No. 104-1, 109 Stat. 3, 24	Contra-distinctions, *passim, e.g.*, §§ 301 *et seq.*, 502, 503 Text of § 503, 109 Stat. 3, 40 (now codified as 2 U.S.C. § 1433): "The Select Committee on Ethics of the Senate and the Committee on Standards of Official Conduct of the House of Representatives retain full power, in accordance with the authority provided to them by the Senate and the House, with respect to the discipline of *Members, officers, and employees* for violating rules of the Senate and the House on nondiscrimination in employment."

Supreme Court, U.S.
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No. 98-525

In the Supreme Court of the United States

OCTOBER TERM, 1998

OPERATION RESCUE NATIONAL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Tort Claims Act, as amended by the Westfall Act, 28 U.S.C. 2671 and 2679(b)(1), which grants immunity from common law tort actions to "officers or employees" of "the executive departments [and] the judicial and legislative branches," provides Members of Congress with such immunity from suit.

2. Whether the Westfall Act's grant of immunity from suit to Members of Congress is within the scope of Congress's constitutional authority.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-525

OPERATION RESCUE NATIONAL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 147 F.3d 68. The opinion of the district court (Pet. App. 8a-56a) is reported at 975 F. Supp. 92.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1998. The petition for a writ of certiorari was filed on September 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, in response to this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), Congress amended the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, by enacting the Federal

Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, popularly known as the Westfall Act. The Westfall Act made clear that employees of the federal government have immunity from common law tort actions for acts undertaken in the scope of their official duties. Congress recognized that such immunity is "essential if Federal employees [a]re to be willing to carry out the duties of their office." H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988).

Under the Westfall Act, when an individual employee of the federal government is sued in state court for a wrongful or negligent act, the Attorney General (or her designee) may certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(2). If the Attorney General makes such a certification, then the suit is deemed to be one against the United States, which is then substituted for the employee as the defendant to the tort action, the individual defendant is dismissed from the suit, and the case proceeds against the United States alone, pursuant to the provisions of the FTCA (including removal to federal court). 28 U.S.C. 2679(d)(2); see *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 419-420 (1995). Moreover, the remedies available against the United States under the FTCA are exclusive, and any other action against the individual employee is precluded. 28 U.S.C. 2679(b). In effect, the Westfall Act shields individual government personnel from personal liability for common law tort actions for acts within the scope of their official duties. That immunity attaches even when, as in the present case, sovereign immunity prevents the plaintiff from recovering against the United States under the FTCA. See 28 U.S.C. 2680(h)

(providing that no FTCA remedy shall be available for "any claim arising out of * * * libel [or] slander); *United States* v. *Smith*, 499 U.S. 160, 165-167 (1991).

In the Westfall Act, Congress also amended the FTCA to make clear that its coverage (as to both liability and immunity) extends to torts committed by "officers or employees" of "the judicial and legislative branches." See Pub. L. No. 100-694, § 3, 102 Stat. 4564 (amending 28 U.S.C. 2671). By that amendment, Congress sought to ensure that judicial and legislative personnel would "be covered by the FTCA in the same way as employees of the Executive Branch." H.R. Rep. No. 700, *supra*, at 8. Congress also provided that the United States, as the substituted defendant, would be able to invoke any defenses of judicial or legislative immunity that would be available to the original defendant. See Pub. L. No. 100-694, § 4, 102 Stat. 4564 (amending 28 U.S.C. 2674).

2. On November 15, 1993, United States Senator Edward M. Kennedy attended a fund-raising luncheon at the Boston Park Plaza Hotel. Pet. App. 17a. At a press conference following the luncheon, Senator Kennedy addressed issues of public concern, including a then-pending bill to enact what became the Freedom of Access to Clinic Entrances Act of 1994 (FACE).[1] *Id.* at 18a. Senator Kennedy was the principal sponsor of that legislative proposal, which created federal criminal penalties and civil remedies for the use or threat of violence, physical obstruction, or destruction of property to interfere with access to facilities providing reproductive health care. *Id.* at 16a. The full Senate

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[1] S. 636, 103d Cong., 1st Sess. (1993). That bill subsequently was enacted into law, as Pub. L. No. 103-259, § 3, 108 Stat. 694 (codified at 18 U.S.C. 248).

was scheduled to take up debate on that measure on November 16, 1993, the day after the press conference at issue. *Id.* at 19a.

At the press conference, in response to a question regarding the reasons for the Senator's support for the FACE, the Senator stated:

> Basically, this is legislation to deal with violence and constitutional rights. We're talking about access to a facility for a woman to be able to have her constitutional rights protected, but many of these facilities also provide extremely important services and preventative health care, prescreening, mammography, pap smears, and a number of other health-related items. [P]eople can have a difference on public policy issues, but when we have a national organization like Operation Rescue that has as a matter of national policy firebombing and even murder, that's unacceptable. This is a very targeted legislative remedy to deal with that kind of situation which exists in Massachusetts and in many other parts of the country. Massachusetts in the last two weeks has taken steps to address it and I think it's important that we did.

Pet. App. 18a.

3. a. In November 1994, petitioners brought this suit against Senator Kennedy in the Superior Court for Norfolk County, Massachusetts, claiming that they were defamed by the Senator's remarks. Pet. App. 9a. The United States Attorney for the District of Massachusetts, acting under a delegation of authority from the Attorney General, see 28 C.F.R. 15.3(a), made the requisite statutory certification under the Westfall Act that the Senator's remarks were made within the scope of his official duties. Pet. App. 9a. Based on that cer-

tification, the United States invoked the removal and substitution provisions of the Westfall Act, pursuant to which the action was removed to federal district court, and the United States was substituted as the sole defendant. *Ibid.*

b. In district court, the United States moved to dismiss the action on the ground, *inter alia*, that the FTCA expressly bars defamation actions. See 28 U.S.C. 2680(h). The district court granted the United States' motion to dismiss. Pet. App. 56a. The court rejected petitioners' argument that Senator Kennedy is not protected by the Westfall Act, concluding that Members of Congress fall within the definition of "employee[s] of the Government" under the FTCA. *Id.* at 23a-35a. The court noted that the FTCA defines "employees of the Government" for purposes of that statute to include "officers and employees" of the "legislative branch[]." *Id.* at 28a. It also stressed that, in several other contexts, Congress has used the term "officers" to include Members of Congress, see *id.* at 29a-31a; *Lamar* v. *United States*, 241 U.S. 103 (1916), and that such usage is within the ordinary meaning of the term "officer." The court also aligned itself with the Fifth Circuit's decision in *Williams* v. *United States*, 71 F.3d 502, 504-505 (1995), which concluded that the Westfall Act applies to Members of Congress.

The court rejected petitioners' arguments that the Westfall Act would be unconstitutional if applied to shield Members of Congress from personal liability. The court emphasized Congress's broad authority under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, and concluded that Congress may invoke that power to protect its own ability effectively to carry out its basic power to legislate, as reflected in Article I, Section 1. Pet. App. 42a-51a. In addition, the

court rejected petitioners' assertions that the Speech or Debate Clause, U.S Const. Art. I, § 6, Cl. 1, prohibits application of the Westfall Act to Members of Congress. Pet. App. 51a-56a.

4. The court of appeals affirmed. Pet. App. 1a-7a. The court rejected (*id.* at 4a-5a) petitioners' argument that, because Congress has often referred to Members of Congress in statutes as "members" rather than "officers" or "employees," Congress's omission of the term "members" in the Westfall Act's amendment of the FTCA should be taken as indicative of intent not to cover Members of Congress in that amendment. That argument failed, the court concluded, because, in the Westfall Act, Congress simply amended the term "federal agency" to include the legislative and judicial branches; it did not affirmatively use any "restrictive language" with the intent to exclude Members of Congress. And the Court agreed with the district court's rejection of petitioners' argument that, as a matter of law, Members of Congress are not "officers" or "employees" of the government. *Id.* at 5a-6a. The court further rejected petitioners' contention that the Speech or Debate Clause defines a "ceiling rather than a floor" of immunity from suit available to Members of Congress, and that the Westfall Act is unconstitutional, describing petitioners' contention as based on "singular logic." *Id.* at 7a.

ARGUMENT

The decision below is correct. It is also in accord with the decision of the only other court of appeals that has addressed the question whether the Westfall Act applies to Members of Congress. See *Williams* v. *United States*, 71 F.3d 502, 505 (5th Cir. 1995); cf. *Sullivan* v. *United States*, 21 F.3d 198, 203 n.8 (7th Cir.)

(suggesting that federal judges also have immunity under the Westfall Act), cert. denied, 513 U.S. 1060 (1994). Further review is therefore not warranted.

1. a. The court of appeals correctly concluded that a straightforward reading of the pertinent statutory language shows that Members of Congress fall within the broad range of "employee[s] of the Government" to whom the FTCA and the Westfall Act apply. The FTCA expressly defines "[e]mployee of the government" to include "officers or employees of any federal agency." 28 U.S.C. 2671. "Federal agency," in turn, expressly includes "the judicial and legislative branches * * * of the United States." 28 U.S.C. 2671. Senator Kennedy was therefore exempt from liability under the Westfall Act because he is an "officer" of the "legislative branch * * * of the United States."

The pivotal statutory language, used both in creating a remedy against the United States and in making that remedy exclusive, refers to "any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b), 2679(b)(1). As just noted, the FTCA further defines those terms in 28 U.S.C. 2671, where "[e]mployee of the government" is broadly defined to include "officers or employees of any federal agency * * * and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. "Federal agency," in turn, was given a broad definition in language that includes "the judicial and legislative branches" of government. 28 U.S.C. 2671. The latter provision was added by the Westfall Act to "explicitly extend[] the coverage of the FTCA to officers and employees of the legislative and judicial

branches." H.R. Rep. No. 700, *supra*, at 5. See also *Williams*, 71 F.3d at 505.

The court of appeals correctly recognized that the ordinary meaning of the word "officer" is entirely consistent with application of the Westfall Act to Members of Congress. Pet. App. 6a. In common parlance, the term "officer" applies to "one who holds an office" or "one who is appointed or elected to serve in a position of trust, authority, or command." *Id.* at 31a (quoting *Webster's Third New International Dictionary* 1567 (1976)). These definitions reflect the "plain meaning" of the term "officer" and comport with a United States Senator's position as an official elected to a position of trust to serve as a representative of the people. See *Williams*, 71 F.3d at 505.[2]

The court of appeals' reading of the FTCA and the Westfall Act to include Members of Congress also is fully consonant with the dual purposes of those Acts: providing compensation to persons injured by federal personnel, and ensuring that federal personnel are not deterred from fully carrying out their duties. By including Members of Congress within the definition of

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[2] Other aspects of the FTCA also support the decision below. First, the FTCA, as amended by the Westfall Act, allows the United States, once it is substituted as a defendant for the individual officer or employee, to invoke any defense of judicial or legislative immunity that could have been invoked by the individual defendant. 28 U.S.C. 2674. This suggests that Congress intended the Westfall Act to cover those who were covered by legislative immunity, including Members of Congress. And even if there were doubt as to whether Senator Kennedy were an "officer" of the Legislative Branch, the FTCA's definition of "[e]mployee" also covers "persons acting on behalf of a federal agency in an official capacity," 28 U.S.C. 2671, language plainly broad enough to cover a United States Senator fulfilling his official functions.

"[e]mployee" of the federal government, Congress ensured that negligent acts committed by Members of Congress in the scope of their employment (as, for example, a negligent automobile accident) could form the basis of liability against the United States if the FTCA permitted such liability; petitioners' construction, by contrast, would preclude recovery against the United States in all such circumstances. At the same time, the Westfall Act's extension of immunity from personal liability for common law tort actions to Members of Congress ensures that such Members, like other federal officers, are not unduly chilled in executing their official functions by the prospect of lawsuits and damages.

b. Petitioners argue (Pet. 8-12) that the term "officer" as used in federal statutes has a constitutionally based meaning, predicated on the Incompatibility Clause, U.S. Const. Art. I, § 6, Cl. 2, that necessarily excludes Members of Congress. This Court, however, has construed the term "officers" in a federal statute to include Members of Congress. In *Lamar* v. *United States*, 241 U.S. 103 (1916), the Court held that a Member of Congress is an "officer acting under the authority of the United States" within the meaning of a criminal statute punishing the impersonation of such an officer. *Id.* at 112-113. In so doing, the Court specifically rejected the argument that interpretation of such a statute must be dictated by the use of the term "officer" in the Incompatibility Clause; the Court looked instead to the ordinary meaning of the term as found in dictionaries, as well as a consideration of the terms and purposes of the statute as a whole. *Ibid.* Similarly, a broad reading of the term "officer" has been adopted in a line of lower-court decisions holding Members of Congress to be "officer[s] of the United States" for the

purposes of 28 U.S.C. 1442(a)(1), which permits federal officers to remove state court actions to federal court. See *Brown & Williamson Tobacco Corp.* v. *Williams*, 62 F.3d 408, 412-415 (D.C. Cir. 1995); *Williams* v. *Brooks*, 945 F.2d 1322, 1325 n.2 (5th Cir. 1991), cert. denied, 504 U.S. 931 (1992); *Richards* v. *Harper*, 864 F.2d 85, 86-87 (9th Cir. 1988). Petitioners' textual arguments are therefore without merit.

2. The court of appeals also correctly concluded that Congress has the constitutional authority to grant its Members immunity from common law tort suits. As the lower courts observed, see Pet. App. 7a, the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, affords Congress broad authority to enact legislation that Congress deems necessary to carry out its underlying constitutional powers. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). That authority is sufficient to sustain the grant of immunity to legislators in the Westfall Act, which reflects Congress's determination that such immunity is necessary to protect the official functions of federal legislators.

In order for Congress to exercise any of the powers enumerated in the Constitution, its Members must have the ability to legislate. The Constitution itself grants Members of Congress immunity from suit based on their acts of debate and voting in the Houses themselves. U.S. Const. Art. I, § 6, Cl. 1 (Speech or Debate Clause). But Congress could rationally conclude that, to be effective legislators, Members of Congress must have a broader immunity, extending to all acts in the scope of their official duties, and not just debate and voting. As the district court observed, to serve their constituents and the public faithfully, Members of Congress are expected to inform constituents and the public at large about issues of public concern being con-

sidered by Congress. Pet. App. 48a (citing *Williams*, 71 F.3d at 507). It was therefore reasonable for Congress to conclude "that its members would be aided in their effort to inform their constituents, to provide leadership on issues of public importance and, in the process of being more candid and forthcoming, to be more readily accountable to those who elected them if they were not inhibited by the threat of lawsuits and liability for the statements they made outside of Congress in performing these functions." *Id.* at 49a.

This Court has frequently recognized Congress's authority to define the scope of federal officers' immunity from suit. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 500, 504 (1978) (refusing to accord federal officials a higher degree of common law immunity from liability than that accorded state officials "in the absence of congressional direction to the contrary"); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 747 (1982); *id.* at 790 (White, J., dissenting); cf. *Clinton* v. *Jones*, 117 S. Ct. 1636, 1652 (1997) (noting that Congress may "respond with appropriate legislation" if it believes that the President should be granted immunity beyond that already recognized by the courts). Indeed, in *Westfall* this Court specifically invited congressional action to address the scope of federal official immunity, recognizing that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." 484 U.S. at 300. Congress's extension of Westfall Act immunity to Members of Congress reflects its recognition that the policies supporting official immunity from common law suits are as applicable to the official functions of federal legislators as to officers and employees of the other Branches.

Petitioners' suggestion that Congress does not possess constitutional authority to grant its Members immunity beyond that conferred upon them by the Speech or Debate Clause (Pet. i, 25) is without merit. That Clause, which provides that "for any Speech or Debate in either House" the Members of Congress "shall not be questioned in any other Place," U.S. Const. Art. I, § 6, Cl. 1, is included in the text of the Constitution among the privileges of Members of Congress, not among the limitations on Congress's power set forth in Article I, Section 9. Thus—quite to the contrary of petitioners' supposition—the structure of the Constitution strongly indicates that the Speech or Debate Clause imposes no prohibition upon legislation that otherwise is properly within the power of Congress to enact.

This Court has specifically rejected the proposition that the Speech or Debate Clause impliedly precludes the development of further immunities not expressly called for in the Constitution. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 n.31 (1982) (rejecting the argument that because the Speech or Debate Clause provides a textual basis for congressional immunity, "the Framers must be assumed to have rejected any similar grant of executive immunity"). It is undisputed, moreover, that Congress has authority to grant immunity from suit to officials and employees in the other Branches of government. Under petitioners' constitutional theory, however, Congress would be the only Branch of government subject to a constitutional ceiling on its immunity—simply because the Framers singled it out for *protection* by providing a constitutional floor of immunity in the Speech or Debate Clause. Nothing in precedent, logic, or the text of the Constitution supports such an anomalous result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-525

In the
Supreme Court of the United States
OCTOBER TERM, 1998

OPERATION RESCUE NATIONAL, PHILIP F. LAWLER, RANDALL TERRY DBA OPERATION RESCUE AND ROBERT D. JEWITT DBA OPERATION RESCUE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeal for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondent.

SUMMARY OF ARGUMENT

In its Brief in Opposition, the United States demonstrates why this Court should grant the Petition. Answering the question whether Members of Congress are officers of the United States[1], heretofore a distinguishing feature central to the American form of government, will provide the necessary statutory guidance in interpreting the Federal Tort Claims Act, as amended by the Westfall Act, as well as providing similar guidance respecting numerous other federal statutes wherein are found the phrases, "Members, officers, employees" and

1. The United States Attorney had certified that Senator Edward M. Kennedy "was acting within the scope of his employment as an officer and employee of the United States." Pet. at 4.

"officers, employees."

REPLY ARGUMENT

1.a. In its opposition, tracking the decisions below, the United States confuses Members of Congress with officers of the United States generally, or with the officers and employees of the legislative branch specifically. As Petitioners have amply documented, Congress has always expressed itself unequivocally -- with positive statements -- when it intends for its Members to be included within a particular statute's provisions. In this case, such an expression is not found in the Westfall Act or its legislative history[2]. If Congress means to

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2. The United States suggests, Brief in Opposition at 10-11, that Congress could have "rationally conclude[d]" that its Members required broader immunity to be "effective legislators." This conjecture ignores entirely the Speech or Debate Clause. Petitioners had argued that the Speech or Debate Clause has given Members the full spectrum of legislative immunity enabling Members to be fully "effective legislators." This Clause has provided perfect and comprehensive immunity to Members for more than two centuries without any complaint of inadequacy respecting the "ability to legislate." Brief in Opposition at 10.

Further, the United States misunderstands, Brief in Opposition at 9, the strength of the Speech or Debate Clause. This Clause enables Members to execute the legislative process -- the sole, constitutionally-designated function of Members -- without fear of recrimination. Thus, Members have never been "unduly chilled," Brief in Opposition at 9, in carrying out any aspect of their constitutional function.

Statutory interpretation, where required, discovers what

include its Members within the Westfall Act, then Congress, not the courts, is the entity to make this express declaration.

The generally accepted legal postulates of statutory interpretation include the precept that the specific use of a term is preferred over any general use that might otherwise be ascribed to the term. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 574-75, (1995). This Court has held, for example, that the word "officer" means "any appointee exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), *Weiss v. United States*, 510 U.S. 163, 170 (1993), and who has been "appointed in the manner prescribed by § 2, cl. 2, of [] Article [II]." *Buckley*, at 126. And consistent

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Congress has done not what courts speculate. To proceed otherwise with that delicate function is to "profoundly mistake[]" the role of the judiciary. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-01 (1991); see also *id.* at 98-101.

Moreover, if Congress rationally concluded, as the United States suggests, that its Members needed greater immunity, neither the Westfall Act nor its legislative history contains any indication thereof. Indeed, in the legislative history underlying the Westfall Act, not one word is found in support of the position taken by the United States that Congress perceived, needed, or wanted greater immunity for Members. Oddly, Congress' failure to include the word "Members" represents the sole and peculiar evidence offered by the United States to support its claim that Members were to be considered officers within the meaning of this statute. "Inaction, we have repeatedly stated, is a notoriously poor indicator of congressional intent, see, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983); *Zuber v. Allen*, 396 U.S. 168, 185-86, n. 21 (1969)." *Schweiker v. Chilicky*, 487 U.S. 412, 440 (1988) (Brennan, J., dissenting).

with this understanding, Congress itself has, through its historical practice, excluded its Members from the scope of the term "officers" as used in federal statutes, except through express statement.

Petitioners demonstrated in the courts below that Members of Congress are elected, U.S. Const. Art. I, §§ 2, 3, amend. XVII[3], not appointed, and that they exercise their constitutionally-conferred legislative authority, pursuant not to "the laws of the United States," but rather pursuant to authority flowing directly to them from the people themselves. U.S. Const. Art. I, § 1. "Law[s]" of the United States, U.S. Const. Art. 1, § 7, result only when Congress and its Members exercise its and their respective constitutionally-conferred authority. U.S. Const. Art. I, §§ 1, 7. Cf. *Clinton v. City of New York*, 118 S. Ct. 2091, 2103-04 (1998).

Unlike officers, who are directly accountable to and answerable to Congress through the impeachment process[4], Members of Congress are only accountable to the direct source of their authority, the people themselves.

The United States, Brief in Opposition at 8-9, insists that

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3. Representatives in Congress are endowed with the "representative trust," The Federalist No. 57, at 351 (James Madison) (Clinton Rossiter ed. 1961) Senators in Congress are endowed with the "senatorial trust." The Federalist No. 62, at 376 (James Madison) (Clinton Rossiter ed. 1961).

4. All civil officers of the United States are subject to impeachment and removal, the power of which lies solely in the United States Congress.

one common dictionary definition of "officer" controls the statutory construction of the Westfall Act, notwithstanding (1) the historical definition and understanding of the term "officer" as used by Congress when drafting federal statutes, (2) the consistent use by Congress of the specific word "Members" to accomplish the inclusion of its Members within a particular statute, (3) the well-established practice of Congress to state expressly when its Members are to be embraced within the confines of a particular statute, and (iv) this Court's understanding of the statutory term "officer." The United States presumes, and would have this Court believe, that when Congress enacted the Westfall Act, it wrote upon a blank slate using generic terms divorced from historic and well-established usages.

In its footnote 2, the United States cuts arguments from whole cloth. The legislative immunity referenced in Title 28 U.S.C. § 2674 has no bearing on Members for a simple reason. Members are already possessed with full legislative immunity by virtue of the Speech or Debate Clause. Therefore, the intended beneficiaries of § 2674 are those to whom a derivative benefit may flow from the Speech or Debate Clause's immunity, namely, legislative officers and employees. See, e.g., *Gravel v. United States*, 408 U.S. 606 (1972).

As to the "acting on behalf of" language found in Title 28 U.S.C. § 2671, the argument of the United States also fails. Individual Members do not act on behalf of the legislative branch. Rather, Members act on behalf of the people. The Congress of the United States is "a body composed of representatives of the people." *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995). Further, this language has been held only "to cover special situations" such as the

"dollar-a-year man" or employees of another placed under the direct supervision of a federal agency. *Logue v. United States*, 412 U.S. 521, 531 (1973). Neither situation applies to a Member of Congress.

1.b. Reliance by the United States on *Lamar v. United States*, 241 U.S. 103 (1916), is misplaced. Lamar dealt with a criminal statute, not a civil statute such as the Federal Tort Claims Act or the Westfall Act. Further, Lamar assessed the criminal conduct of a third party; the conduct of a Member of Congress was not the focus of that case. The statute in Lamar, unlike the statute at issue here, did not attempt to alter the constitutionally established relationship of Members of Congress with the people themselves. And, finally, Lamar preceded this Court's decisions in *Myers v. United States*, 272 U.S. 52 (1926), *Buckley v. Valeo*, 424 U.S. 1 (1976), and, *Bowsher v. Synar*, 478 U.S. 714 (1986).

Respondent's invocation of *Williams v. United States*, 71 F.3d 502 (5th Cir. 1995), and cases under Title 28 U.S.C. § 1442 (holding a Member of Congress to be an "officer of the United States"), is unavailing. These holdings fly in the face of Congress' own well-established and well-documented practices. These cases contain no discussion of the arguments presented herein by Petitioners, notably the bright line established between Members of Congress and officers of the United States.

2. The constitutional exegesis by the United States is unsound and incorrect. The United States maintains, Brief in Opposition at 12, that unless the Constitution contains an express prohibition on Congress' ability to expand its Members' immunity beyond that conferred by the Speech or Debate Clause, Congress is necessarily possessed with such authority.

The United States ignores first principles. The Constitution of the United States does not endow the federal government with the universe of powers, excepting only those powers expressly reserved or prohibited. To the contrary, the federal government has been delegated only those powers, "few and defined," The Federalist No. 45 , at 292 (James Madison) (Clinton Rossiter ed. 1961), textually and specifically granted. Cf. U.S. Const. amend. X. Petitioners should not have been required in the courts below to show a restraint upon Congress' powers; rather, it was the unmet burden of the United States to show that Congress possesses, by express delegation, the claimed federal power. Cf. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997).

The express delegations in the Constitution of powers "few and defined" do not include any power by which Congress could enlarge the immunity of its Members. Thus, it is this absence of an express delegation that operates as a constitutional limitation on the power of Congress to so enshroud itself. Cf. *Clinton v. City of New York*, 118 S. Ct. 2091, 2103 (1998).

The Necessary and Proper Clause is not a stand-alone independent grant of federal power. The United States has not answered Petitioners' argument that the Necessary and Proper Clause is a derivative, secondary power that can only be used in conjunction with a primary power. Hamilton expressed precisely this understanding in The Federalist No. 33.

The United States invokes a series of cases, *Butz v. Economou*, 438 U.S. 478 (1978), *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Clinton v. Jones*, 117 S.Ct. 1636 (1997), in a unsuccessful bid to place persons who are undoubtedly officers of the federal government (the Secretary of Agriculture and the

President) on par with Members of Congress. Respondent's invocation of these cases evinces its failure to recognize the organic distinction between Members of Congress and officers of the United States. Congress could, of course, as these cases hold, grant greater immunity to such officers of the United States who are creatures of statute.

A quite different situation is found for Members, however, who are not statutory creatures. Members represent the people themselves and are called to serve by the direct action of election. Only the people, by means of a constitutional amendment, can alter the terms upon which Members are engaged to represent them. One salient example of such action by the people is the Seventeenth Amendment, by which amendment the method of electing Senators was altered to require direct election by the people. See also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995).

Petitioners have argued that Members were not given the constitutional authority to enlarge their own immunity in order to encourage in Members "an habitual recollection of their dependence on the people." The Federalist No. 57, at 352 (James Madison) (Clinton Rossiter ed. 1961). That Members are without authority to alter by mere statute the constitutionally established relationship between Members of Congress and the people of the United States is recognition that Members are inherently and fundamentally different than officers of the United States, and that they, Members, unlike officers, are accountable directly to the people of the United States. To hold otherwise would conclude that Congress might "define its own powers by altering the [Constitution's] meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with

ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.' *Marbury v. Madison*, 1 Cranch, at 177, 2 L.Ed. 60." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997).

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted and the case set for plenary review.

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